

*Law & New York*

IN THE  
COURT OF APPEALS.

THE PEOPLE OF THE STATE OF NEW-YORK,

ON THE RELATION OF

THOMAS E. DAVIS & COURTLANDT PALMER,

*against*

—  
C A S E .  
—

ROBERT J. DILLON,

*Attorney for Appellant.*

McMURRAY & HILTON,

*Attorneys for Respondents.*

—  
New-York :

COLLINS, BOWNE & CO. PRINTERS,

*Stationers' Hall, 174 and 176 Pearl Street.*

—  
1853.



# In the Court of Appeals.

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THE PEOPLE OF THE STATE OF NEW-YORK,

ON THE RELATION OF

THOMAS E. DAVIS & COURTLANDT PALMER,

*against*

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## CASE.

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ROBERT J. DILLON,

*Attorney for Appellant.*

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*Attorneys for Respondents.*

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# SUPERIOR COURT

OF THE CITY OF NEW-YORK.

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The People of the State of New-York,  
on the relation of Thomas E. Davis  
and Courtlandt Palmer,  
*against*

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CLERK'S OFFICE,  
*Superior Court of the City of New-York.*

I, Robert G. Campbell, Clerk of the Superior Court of the city of New-York, having compared the annexed copies of the notice of appeal, and of the judgment roll, in the above entitled action, with the originals on file in this office, do certify that the same is a correct transcript therefrom, and of the whole of said *originals.*

1

In witness whereof, I have hereunto subscribed my  
[L. S.] name, and affixed the seal of the Superior  
Court of the City of New-York, this fifteenth  
day of March, A. D. 1853.

R. G. CAMPBELL, *Clerk.*

## SUPERIOR COURT OF THE CITY OF NEW-YORK.

---

The People of the State of New-York,  
on the relation of Thomas E. Davis  
and Courtlandt Palmer,  
*against*

---

The said Oscar W. Sturtevant hereby appeals to the Court of Appeals, from the final order or judgment in this proceeding, entered at the General Term of this Court, on the 2 twelfth day of *March*, 1853.

Dated New-York, March 12th, 1853.

Yours, &c.

To R. G. CAMPBELL, Esq. *Clerk of the Court; and*  
McMURRAY & HILTON, Esq'rs. *Plaintiffs' Attorneys.*

## NEW-YORK SUPERIOR COURT.

*City and County of New-York.*


---

Thomas E. Davis and Courtlandt Palmer, }  
 against }  
 The Mayor, Aldermen and Commonalty of }  
 the City of New-York. }

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The plaintiffs, Thomas E. Davis and Courtlandt Palmer, in this suit, complain to this court, as well on their own behalf, as on behalf of all other corporators and tax payers of the city of New-York, who may be affected by the several matters 3 herein complained of, against the Mayor, Aldermen and Commonalty of the city of New-York.

The plaintiffs, for a cause of complaint, respectfully show to the court :

That they are citizens of the State of New-York, and residents and inhabitants of the city of New-York, and have been such residents and inhabitants for several years last past, and are two of the corporators of said city.

That they are severally owners of very considerable real estate situated on the street known in said city as Broadway, and elsewhere in said city; and are also severally owners of 4

considerable personal estate in said city, subject and liable to taxation ; and have been such owners of real estate for many years past, and have been severally annually taxed and assessed upon the same, and have severally paid such taxes and assessments annually, to an amount exceeding two hundred and fifty dollars, levied towards and for the public expense of governing the said city and the inhabitants thereof.

The plaintiffs show, upon information and belief, that the taxes levied and assessed by the defendants upon the real and personal property of the citizens and *tax* payers of said city for several years past, are as follows :

For the year 1846 .....	\$1,654,323 00
For the year 1847 .....	\$1,824,211 00
For the year 1848 .....	\$1,992,150 00
For the year 1849 .....	\$2,302,564 00
For the year 1850 .....	\$2,578,969 00
6 For the year 1851 .....	\$2,258,150 00
For the year 1852 .....	\$2,561,650 00

And the amount estimated as required for the coming year, amounts to the enormous sum of \$3,972,195.00.

That by reason of the corrupt and illegal acts of said defendants, in squandering the public moneys, in farming out and disposing of, in almost every imaginable way, the public property, contracts, rights, privileges and franchises, in the manner hereinafter stated, and in various other ways, the taxes of 7 said city are annually increasing to an alarming degree. The

effect has already been to induce large numbers of persons, doing and transacting business in said city, to remove out of the limits thereof, to avoid the onerous and increasing taxes annually imposed upon the property owners of said city.

That the said city of New-York is an ancient and chartered city, and the citizens and inhabitants thereof are a body politic and corporate, under the name of The Mayor, Aldermen and Commonalty of the city of New-York.

That all the lands, tenements, hereditaments, jurisdictions, liberties, immunities, franchises, *rights* and privileges, held, 8 exercised and enjoyed by the said corporation of the said city were given, granted and acquired by them under the said name of the Mayor, Aldermen and Commonalty of the city of New-York.

That the said body politic and corporate, has perpetual succession, and is able in law to sue and be sued, implead and be impleaded, answer and be answered unto, defend and be defended, in all or any of the courts of this State, having jurisdiction over corporations, in all and all manner of actions, suits, complaints, pleas, causes and matters, and demands *whatsoever*, of what kind or nature soever, in as full and 9 ample manner and form as other people of this State.

That all the powers of the said Corporation are held by them, upon the trust that they shall be used and exercised for the benefit of the citizens and inhabitants of said city, without any fraud, corruption, evil practice or deceit.

That in and by the ninth section of an act of the Legislature of this State, entitled "An Act to amend the Charter of 10 the City of New-York," passed April 2d, 1849, it is *declared*, that the executive power of the Corporation shall be vested in the Mayor, the heads of departments, and such other executive officers as shall be created from time to time by law; and neither the Common Council, nor any committee or member thereof, shall perform any executive business whatsoever, except such as is or shall be specifically imposed on them by the laws of this state, and except that the Board of Aldermen may approve or reject the nominations made to them as thereafter provided.

11 That in and by section 12 of said act, it is further enacted: that there shall be an Executive Department in said Corporation, under the denomination of the "Street Department," which shall have cognizance of opening, regulating and paving streets, building and repairing wharves, &c.

That by section 19 of said act, it is, among other things, enacted: That no member of the Common Council, Head of Department, Chief of Bureau, or Deputy thereof, shall be directly or indirectly interested in any contract, work or business, or the sale of any article, the expense, price or consideration of which is paid from the City Treasury, or by *any* assessment levied by any act or ordinance of the Common Council.

That in and by the eleventh section of an act of the Legislature, entitled "An Act to amend the Charter of the City of New-York," passed April 7th, 1830, it is further enacted:

That no member of either Board of the Common Council shall, during the period for which he is elected, be directly or indirectly interested in any contract, the expenses or consideration whereof are to be paid under any ordinance of the Common Council, except emoluments or fees which he is entitled to by virtue of his office.

13

And the plaintiffs further show, That, under the laws of this state, the said Corporation are Commissioners of Highways, and as such, have the power of making repairs upon said streets, and to make them useful and convenient for all the inhabitants of said city, and travellers and sojourners therein.

That said Corporation have not, either in or by their charter, or by the laws of this state or otherwise, any power whatsoever to give or grant to any person or persons whomsoever, any particular or exclusive privilege to use any street or 14 streets, or any part of any street or streets in said city ; or to erect or put up any building, work or structure, or any obstruction whatsoever in the said streets or any of them, or to do any other act which might, in any manner, interfere with the free and common use thereof by any of the inhabitants of, or travellers in said city, or which might become a nuisance.

The plaintiffs further show, That on the 16th day of July, 1852, a petition, of which a copy is annexed hereto, marked A. and forming *part* of this complaint, was presented to said 15 Common Council, through their said Board of Aldermen, for an ordinance authorizing the petitioners who signed the same, to establish and construct a rail road in said Broadway.

That, afterwards, numerous remonstrances were presented to said Board of Aldermen by the principal owners of property on Broadway, against such project.

The plaintiffs further show, that said Broadway is the principal street or thoroughfare in said city. That the greater part of that portion of said street which lies between the Battery at the south, and Union Place at the north, a distance of about three miles, is now devoted to trading and commercial purposes; and a large portion of the trading and commercial business of the said city, greater than that of any other street, is now transacted in said street, and the small portion of the street which is yet used for dwellings, is rapidly changing its character, and stores, shops, and other buildings for trading and commercial purposes, are rapidly taking the place of dwelling houses.

The plaintiffs further say, on information and belief, that said street is now constantly thronged with all kinds and descriptions of vehicles and passengers. *That* the portion of said street located below Canal-street, a distance of about a mile and a half from said Battery, is more thronged and crowded than any other part of said street or said city. That the average width of the carriage-way in said Broadway does not exceed forty feet; that at Maiden Lane, it does not exceed thirty-nine feet, and from thence it gradually narrows to thirty-seven feet at Wall-street; from thence to about forty feet below Rector-street, it narrows to thirty-four feet; from thence to about two hundred and fifty feet *below* Rector-street it gradually widens to not over thirty-seven feet; at one hundred feet farther down, it is thirty-eight feet two inches,

and thus gradually widens to not exceeding forty feet two inches in front of No. 42 Broadway; and at no point between the Park and Union Place, does said carriage-way exceed forty-two feet in width.

The plaintiffs further show, that for the purpose of putting the said carriage-way in the most perfect order and condition, and to facilitate the great and increasing travel thereon, which is at this time *far* beyond that of any other street in said city, 19 the said Corporation have very recently caused about two miles and a half thereof, extending (with the exception of a few blocks,) from the Battery to Eighth-street, to be paved with a very durable and expensive pavement, known as the Russ pavement, consisting of square blocks of granite, carefully laid upon a concrete bed of hydraulic cement, mixed with gravel and sharp stones.

That said Corporation have, as the plaintiffs are informed and believe, expended upon said pavement, and paid, or are bound to pay therefor, out of the *city* treasury, upwards of 20 \$500,000. By means whereof, a great burden has been brought upon the tax payers of said city, including the plaintiffs.

The plaintiffs further show, that before any final action was had upon said petition, and while the same was before the Common Council for consideration, various other petitions and propositions were presented to them by men of wealth, character and standing, residents of said city, fully and abundantly able to fulfil and perform their engagements and promises, asking for the privilege and authority to construct and

21 establish such a rail *road* in said Broadway, and run cars and carry passengers, upon the following terms :

1. One of said propositions, was to give for such authority and privilege, \$1,000,000, payable in ten annual instalments, and agreeing to charge each passenger only three cents fare.

2. Another of the said propositions, was to give for such authority and privilege, the sum of \$1,666.66 for each car run thereon, and agreeing to charge each passenger only five cents fare.

3. Another of the said propositions was, to give for such 22 authority and privilege, as a license fee for each car, any sum imposed, not exceeding \$1,000 per annum, and agreeing to charge each passenger only three cents fare.

4. Another of the said propositions was, to give the Corporation, for such authority and privilege, in lieu of license fees, one cent for each passenger thereon, and agreeing to charge each passenger only five cents fare.

5. Another of the said propositions was, for such authority and privilege, to charge each passenger only five cents fare ; and also pay into the city treasury, for the benefit of said 23 city, a bonus of \$100,000 per annum.

6. Another of the said propositions was, for such authority and privilege, to conform and comply in all respects with the covenants and conditions set forth in a resolution, of which a

copy is hereunto annexed, marked B. and further agreeing therefor, to reduce the rate of fare, mentioned in the 12th subdivision of said resolution, from five cents to three cents for each passenger.

The plaintiffs further state, upon information and belief, that the offer contained in said proposition, numbered 2, would, if accepted, produce a sum *exceeding* \$250,000 per annum, for the benefit of said Corporation, and the relief of the tax-paying citizens, while each passenger would be charged but five cents fare.

That the offer contained in said proposition, numbered 4, would, if accepted, produce a sum exceeding \$300,000 per annum for the benefit of said Corporation, and the relief of the tax-paying citizens, while each passenger would be charged but five cents fare.

That the offer contained in said proposition, numbered 5, would, if accepted, produce the sum of \$100,000 per annum, for the benefit of said Corporation, and the relief of the tax-paying citizens, while each passenger would be charged but five cents fare.

That the offer contained in said proposition, numbered 1, would, if accepted, produce the sum of \$1,000,000 for the benefit of said Corporation, and the relief of the tax paying citizens, while these plaintiffs, and other persons riding in said cars, would be charged but three cents fare, and be thereby materially benefited.

That the offer contained in said proposition, numbered 3,  
26 would, if accepted, produce the *sum* of \$150,000 per annum,  
for the benefit of said Corporation, and the relief of the tax  
paying citizens, while these plaintiffs, and other persons riding  
in said cars, would be charged but three cents fare, and would  
be thereby materially benefited.

That the offer contained in said proposition, numbered 6,  
would, if accepted, materially benefit these plaintiffs, and  
other persons riding in said cars, by establishing the rate of  
fare at three cents, while the Corporation and said tax payers  
and citizens would derive all benefit which can or may be  
27 derived from the *covenants* and conditions mentioned and set  
forth in said resolution annexed, marked B.

And the plaintiffs further show, that in and by the charter  
of said Corporation and the laws of this State, the legislative  
powers of said defendants are vested in the Boards of Alder-  
men and Assistant Aldermen thereof, and monthly sessions of  
said Boards are authorized to be held, commencing on the  
first Monday of each month, and to continue for such period  
as in their opinion the public business may require. But  
neither Board is authorized to adjourn for a longer period  
28 than three days, except *by* a resolution to be concurred in by  
the other body.

The plaintiffs further show, that the last November session  
of said Boards commenced on the first day of said month; on  
which day said Board of Aldermen met, and adjourned to the  
4th then instant. On said 4th day of November, said Board of  
Aldermen again met, and adjourned to the 8th then instant,

without the concurrence of said Board of Assistant Aldermen, by resolution or otherwise; whereby and by means whereof, as the plaintiffs claim and insist, the session of said Board of Aldermen, and their powers as a *legislative* body, and part of 29 said Common Council, for and during said month of November, ceased and determined on said 4th day of November, 1852.

Notwithstanding which, said Board of Aldermen afterwards, and on the 19th day of November, 1852, met, and under the color of being assembled as a Board of Aldermen and co-ordinate branch of said Corporation, adopted a resolution, of which a copy is hereunto annexed, marked B. and which forms a part of this complaint.

That afterwards said resolution was transmitted to said Board of Assistant Aldermen, for their concurrence. *That* 30 on the 6th day of December, 1852, (being the first day of the session for that month,) the said Board of Assistant Aldermen did, notwithstanding the remonstrances and petitions aforesaid, adopt said resolution, and order the same to be transmitted to the Mayor of said city, for his approval.

That subsequently, and on December 18th, 1852, said Mayor returned said resolution to said Board of Aldermen, without his approval, and accompanied by his objections thereto. A copy of such objections are hereunto annexed, marked C. and form a part of this complaint.

*The* plaintiffs further show, upon information and belief, 31 that the several and respective members of the said Boards

who voted in favor of said resolution and grant, being a majority of the members elected to each of said Boards, have given out, threatened, and declared, that they intend to adopt and pass said resolution, notwithstanding the objections of said Mayor, and that they intend to keep said Boards in session during the month of December for that purpose; and to that end have met and adjourned, (frequently for want of

32 a quorum for the transaction of business,) from time to time, in anticipation of the coming in of said Mayor's objections, and with the intent of protracting their session, for the purpose of passing and adopting said resolution, notwithstanding their compensation for service in their respective Boards terminated after the first eight days of their session—and which have long since expired; and these plaintiffs are apprehensive that said resolution will be passed as aforesaid, as soon as the said Boards can by law act on the same.

The plaintiffs further show, on information and belief, that the grantees or persons named in said resolution have given 33 out and alleged, *that* upon said resolution being adopted by said Boards, they intend forthwith to accept the same in writing, as therein provided, and will thereupon proceed to break up the pavement, lay down the said railway, and establish said rail road in said Broadway.

The plaintiffs further show, that the laying down of such a railway, and the establishment of a rail road in such a thronged thoroughfare as Broadway, is as yet an untried experiment; and the same cannot, as the plaintiffs are informed and believe, be laid in said street without disturbing, and thereby destroying said Russ pavement so recently laid 34 *therein*, at such a vast expense to the tax payers of said city.

The plaintiffs further show, upon information and belief, that the laying of such railway would require at least four months, if prosecuted with diligence; during all which period, said street would be rendered almost wholly impassable, to the great injury and detriment of these plaintiffs, and other persons having occasion to use and travel in said street.

The plaintiffs further say, that they, and all other citizens and travellers, now have a right to the free and common use of the whole of the carriage-way of *said* street, with their 35 carts, carriages, and other vehicles; and that establishing a rail road in said street will be appropriating the street to a new and unauthorized use, and one which is exclusive in its nature, to the great injury and damage of those who now have a free and common right therein as aforesaid.

The plaintiffs further show, that said street is too narrow to admit the establishing of such railway, consistent with the rights, privileges, and interests of the citizens and tax payers of said city, and other travellers in said street. And, further, the plaintiffs are advised and *believe*, and therefore charge, 36 that such railway, if constructed, will be a public nuisance in said street.

And the plaintiffs further aver, on information and belief, that said Corporation has no right, power, or authority, under any law of this State, or otherwise, to establish or construct such a rail road in said street, nor can they grant the right or privilege to construct and establish such a rail road therein to any person or persons.

The plaintiffs also aver, claim, and insist, that if said Corporation have the right to grant the use of said street to 37 private individuals for *such* a purpose as laying and establishing a rail road therein, then, and in such case, it certainly is the duty of said corporation, and they have the right to impose any proper terms and conditions upon which such grant shall be made, and should consult the true interests of said city by accepting those voluntary offers and terms made by responsible individuals, which, while they insured equal accommodation to said citizens, tax payers, travellers, and the public generally, would secure the highest compensation, and produce the greatest revenue to said city.

38 The plaintiffs also aver, claim and insist, *that* a grant to the individuals named in said resolution upon the terms, stipulations and conditions named therein, will be, if unrestrained, a fraud upon the travelling public and said citizens, because it permits the parties named therein to charge five cents fare for each passenger ; whereas unexceptionable and worthy citizens of abundant means and ability, have offered, and are willing to accept said grant upon the same terms, stipulations and agreements, with a permission to charge only three cents passenger fare.

And further, that a grant to the individuals named in said resolution, upon the terms, conditions and stipulations named 39 *therein*, will be, if unrestrained, a fraud upon the tax payers of said city, including the plaintiffs, because many other unexceptionable and worthy citizens of said city, of abundant means and ability, have offered, and are willing to accept said privilege of constructing and establishing such railway, and

pay therefor into the city treasury annually, many hundred thousands of dollars, and which would materially diminish the annual taxes levied and imposed in said city—said resolution only permitting the imposition of the nominal sum of \$20 per car, by way of license fee; whereas \$1000 and *upwards*, by 40 way of license fee on each car, has been voluntarily offered as aforesaid, for such permission, grant and privilege.

The plaintiffs further claim and insist, that the adoption of said resolution should be restrained, because it attempts to bind the said Corporation for ever; and thus limit and control the legislative power of said Common Council.

And also, because it attempts to create an odious and unjust monopoly, not within the legislative powers of said Corporation or Common Council.

The plaintiffs are also advised and believe, and therefore charge and insist, that if the said Corporation are authorized to *construct*, or allow of the construction of such rail road, in 41 the manner provided by said resolution, such authority, and all contracts, stipulations and agreements in relation thereto, are within the province of, and are to be exercised by one of the executive departments of said Corporation, known as the “Street Department.”

The plaintiffs further, upon information and belief, aver that all the said acts and doings of said Common Council, in relation, or tending to the establishment of such rail road, are in bad faith, and in direct opposition to the interests of said Cor-

42 poration, and of the citizens, tax *payers*, and other inhabitants of said city, and of travellers therein.

The plaintiffs therefore, on their own behalf, and on behalf of all other tax paying citizens and inhabitants of said city, demand that an injunction order may be issued by this Court, directed to the said defendants, the Mayor, Aldermen and Commonalty of the City of New-York, their counsellors, attorneys, solicitors and agents, restraining and enjoining them, and each and every of them, from granting, or, in any way or manner, authorizing Jacob Sharp and others, the persons 43 named in said resolution, or their associates, or any *other* person or persons whomsoever, the right, liberty, or privilege of laying a double or any track for a railway in said Broadway, from the South Ferry to 57th street, or any railway whatsoever in said Broadway, or of breaking or removing the pavement, or in any other manner, to obstruct the said street, preparatory to, or for the purpose of laying or establishing any railway therein, until the further order of this Court in the premises.

And the plaintiffs further demand, that this court will make such injunction order perpetual against the said defendants, or 44 afford the plaintiffs, for *themselves*, and others, on whose behalf this suit is brought, such other or further proper, appropriate, and adequate remedy and relief, as the case herein presented entitles them.

McMURRAY & HILTON,  
*Plaintiff's Attorneys.*

*City and County of New-York, ss.*

Courtlandt Palmer and Thomas E. Davis, the above named plaintiffs, being each severally duly sworn, depose and say, that the foregoing complaint is true of their own knowledge, except as to the matters therein stated on information and belief, and as to those matters they believe it to be true.

THOMAS E. DAVIS,  
COURTLANDT PALMER.

Sworn to, before me, this 27th day  
of December, A. D. 1852,  
CHAS. FRASER, *Commissioner of Deeds.*

45

—  
A.

*To the Honorable the Common Council  
of the City of New York:*

The undersigned respectfully petition your Honorable Body to pass an ordinance authorizing your petitioners to establish and construct a rail road, to commence at South Ferry, running thence through Whitehall street, Broadway, and Bloomingdale road, to Manhattanville.

All that part south of Forty-third street to be constructed and put into operation as early as practicable; and the remainder at such time thereafter as your Honorable Body may direct.

46 And your petitioners, as in duty bound, &c. &c. &c.

*Dated, New-York,* 1852.

JACOB SHARP,	D. R. MARTIN,
WILLIAM MENZIES,	JOHN ANDERSON,
FREEMAN CAMPBELL,	JOHN J. HOLLISTER,

And associates.

---

B.

*Resolved*, That Jacob Sharp, Freeman Campbell, William B. Reynolds, James Gaunt, I. Newton Squire, Wm. A. Mead, David Woods, John L. O'Sullivan, Wm. M. Pullis, Jonathan Roe, John W. Hawkes, James W. Faulkner, Henry Dubois, John J. Hollister, Preston Sheldon, John Anderson, John R. Flanagan, Sargent V. Bagley, Peter B. Sweeny, Charles B. White, James W. Foshay, Robert E. Ring, Thomas Ladd,  
 47 Conklin Sharp, Samuel L. Titus, Alfred *Martin*, D. R. Martin, William Menzies, Charles H. Glover, Gershon Cohen, and those who may for the time being be associated with them, all of whom are herein designated as associates of the Broadway railway, have the authority and consent of the Common Council to lay a double track for a railway in Broadway and Whitehall or State street, from the South Ferry to Fifty-ninth street; and also, hereafter, to continue the same, from time to time, along the Bloomingdale road to Manhattanville, which continuation they shall be required, from time to time to make,  
 48 whenever directed by *the* Common Council, the said grant of permission and authority being upon and with the following conditions and stipulations, to wit,

*First.* Such tracks shall be laid under the direction of the Street Commissioner, in or near the middle of the street, the outer rails not exceeding twelve feet six inches apart, and the rails being laid flush and even with the pavement, the inner portion of the rail being of equal height with the outer, with grooves not exceeding one inch in width, or such other rails as shall be approved by the Street Commissioner or the Common Council, *on* such grades as are now established, or may 49 hereafter be established, by the Common Council; and the said associates shall keep in good repair the space between the said rails, and one foot on each side; and no motive power, excepting horses, shall be used below Fifty-ninth street.

*Second.* The said associates shall place new cars on said rail road, with all the modern improvements, for the convenience and comfort of passengers. And they shall run cars thereon, every day, both ways, as often as the public convenience may require, under such directions as the Common Council may, from *time* to time, prescribe. Said cars, with 50 horses attached, not to exceed forty-five feet in length.

*Third.* The said associates shall, in all respects, comply with the directions of the Common Council in the building of such railway, and in the running of the cars thereon.

*Fourth.* At the Bowling Green, the said associates may divide the two tracks aforesaid, running one of them down Whitehall street, and the other down State street, should they deem such division necessary; and also, whenever in the course of their route the said road shall pass a public square,

51 it may be *carried* with a single track, round both sides of said square, instead of only one, for the better accommodation of the public on both sides thereof.

*Fifth.* The said associates shall be required to procure a depot, at some place near or at the lower part of said route, for the purpose of keeping withdrawn from Broadway such proportion of the cars coming down in the morning as shall not be required for the accommodation of the return travel until the afternoon; and also, they shall be required to stop 52 a portion of the cars at the Park, and to send *down* below that point no greater proportion of the whole number employed, than shall be found by experience to be requisite for the accommodation of the travel below that point, subject to regulation by the Common Council.

*Sixth.* The cars shall be so constructed as not to make provision intended for standing passengers to crowd upon the seated passengers; and also, when all the seats are full, the cars shall not be stopped to take in more passengers to be crowded into the said seats; a flag being displayed in front 53 of the car to give notice that all the *seats* are full.

*Seventh.* The said cars shall not be allowed to stop, so as to obstruct a crossing, nor to stop more frequently in a block (unless the same be of extraordinary length) than just beyond its first crossing, except in rainy weather.

*Eighth.* The said associates shall keep an attendant, distinguishable by some conspicuous mark or badge, at every

such appointed stopping place, in all parts of the street usually much crowded with vehicles, whose duty it shall be, with attention and respect, to help in and out of the cars all *passengers* who may desire such assistance, and in general to 54 watch over the safety of passengers from all dangers of passing vehicles.

*Ninth.* The said associates shall be required to keep, or cause to be kept in readiness, a number of sleighs adequate to the public accommodation, when the travel of the cars may be obstructed by snow.

*Tenth.* The said associates shall cause the said street to be well swept and cleaned every morning, and the sweepings carried away, before eight o'clock in summer, and nine o'clock in winter, except Sundays; this provision applying to the whole of the *street* south of Fourteenth-street, above 55 which point the same shall be done as often as twice a week when the weather will permit.

*Eleventh.* No higher rate of fare shall be charged for the conveyance of passengers from any one point to any other point along said route, and such combined system of routes as may hereafter be adopted by means of cars and transverse omnibuses, than five cents for each passenger.

*Twelfth.* In consideration of the good and faithful performance of all these conditions, stipulations and requirements, and of such other requirements as may hereafter be made by the Common Council, for the regulation of the said railway, 56

as aforesaid, the said associates shall pay, for ten years from the date of opening the said railway, the annual license fee for each car, now allowed by law, and shall have a license accordingly; and after that period, shall pay such amount of license fee, for further licenses, as the Corporation, with permission of the Legislature, shall then prescribe; or, in default of consenting thereto, shall surrender the road, with all the equipments and appurtenances thereto belonging, to the said Corporation, at a fair and just valuation of the same.

57 *Thirteenth.* Within a reasonable time after the passing of this resolution, the said associates, or a majority in interest thereof, shall form themselves into a joint stock association, which association shall be vested with all the rights and privileges hereby granted, and shall have power, by the votes of at least a majority in interest of the associates, to frame and establish articles of association and by-laws, providing for the construction, operation, and management of the said railway, the mode of admitting new associates, and of transferring the shares or interests of any of the associates to new associates 58 or assigns, the number, duties, mode of appointment, tenure, and compensation of officers, the manner of making contracts, amending the by-laws, and calling in assessments from the associates, and generally the means and mode of establishing the railway and carrying it on, and of controlling and managing the property and affairs of the said association.

*Fourteenth.* The association shall not be deemed dissolved by the death or act of any associate, but his successor in interest shall stand in his place; and the rights of each associate shall depend on his own fulfilment of the conditions imposed

on *him* by these restrictions, or the articles of association and 59 by-laws of the association ; and in case of his failure to fulfil the same, after twenty days' notice in writing to him so to do, his rights shall be forfeited to and devolve upon the remaining associates. And said associates may, at any time, incorporate themselves under the general Rail Road Act, whenever two-thirds in interest of the associates shall require it.

*Fifteenth.* The associates, whose names are set forth in this resolution, shall by writing, filed with the Clerk of the Common Council, signify their acceptance thereof, and *agree* to 60 conform thereto ; and all new associates or assigns, duly admitted according to the provisions of the articles of association, and by-laws, shall be deemed parties to such agreement.

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## C.

*Mayor's Office, December 18, 1852.*

To the Hon. the Board of Aldermen  
of the City of New-York.

GENTLEMEN,

I return herewith, without my approval, the report and resolutions granting to the parties therein named, the privilege of laying down a rail road track in Broadway.

In view of the extended publicity which has been given to this measure since its first conception, I *do not* deem it neces- 61

sary to enter at length upon any argument or detailed statistics in support of the views which I have felt compelled to take with reference to the project, but will very briefly state the reasons which impel me to withhold my sanction from the report under consideration.

Broadway is now the principal thoroughfare of our city, and is destined to continue, throughout its entire length, the most important business street. The laying of a rail road track, which would occupy some twelve feet of a street which  
62 at some points is less than forty feet in *width*, from curb to curb, would in my judgment materially interfere with the comfort and convenience of all classes; would render the street more dangerous and impassable for pedestrians than it now is, for the number of vehicles, besides the cars passing through it, would not be sensibly diminished; would seriously interfere with the business of parties resident thereon, and would depreciate the value of property on the line of the street fully twenty per cent. Even now, with the whole street free for the passage of all vehicles, there are periods when it is  
63 nearly impossible for pedestrians to cross; and in case of an accident to an omnibus or carriage on either side of the street, or a heavily laden cart being backed up to discharge its load, the long lines of vehicles passing up or down would be thrown into great, and possibly, dangerous confusion; and if an accident should occur to one of the cars or to the horses attached to them, the consequences would be equally serious and annoying.

I find, on examination, that a large majority of the owners of property on the street have remonstrated against the pro-

position now under consideration, on these *as well as other* 64 grounds ; and while I am free to admit, that where a great public good is to be derived, private individuals must yield their interests and submit to personal inconveniences, yet, in this case, I cannot discover that the community will be sufficiently compensated by the construction of this rail road to make amends for the great injury which in my judgment, would be visited upon the owners of real estate on Broadway, by the destruction of their business and the depreciation of their property.

But another and serious objection to the expediency of laying the rail road track *in* Broadway, is to be found in the fact, 65 that the principal main of the Croton Aqueduct, from which the largest portion of the city derives its supply of water, is laid in the centre of Broadway below Fourteenth street, with distributing pipes on either side of the street ; and in case of an accident to either of these pipes rendering it necessary to take up any portion of the street, the delay and confusion would be very serious. The cars could not, like the omnibuses, be turned off from Broadway by one street to return to it through *another*, and great inconvenience would result from 66 their stoppage. But even if all these objections did not exist, or could be overcome, I could not consistently give my approval to this project, when I take into consideration the terms upon which this valuable privilege, and I might say monopoly, is to be granted, and which are specified in the report. If the Common Council have the right to grant the use of the public streets to private parties for such a purpose as the laying of a rail road through them, it certainly is their duty to consult the true *interest* of the city, by accepting the terms 67

which would, while they insured equal accommodation to the public, secure a reasonable compensation, and prove a source of revenue to the city. If the community demand the construction of a rail road through any of the thoroughfares, it is your duty to grant that accommodation: but it is equally your duty not to lose sight of the rights and interests of the city, by refusing to grant it to those who will construct it on the most favorable terms, and who are willing to pay the largest amount for the privilege.

68 When *this* resolution was under consideration in the Common Council, four other petitions, containing distinct propositions, were submitted, viz.

*First.*—A petition of Alexander T. Stewart and others, property owners on Broadway, asking for the privilege of establishing a rail road there, and running cars thereon, and agreeing therefor not to charge a greater fare than three cents to each passenger, and also agreeing to pay for each car as a license fee, any sum imposed, not exceeding one thousand dollars per annum.

69 *Second.*—A petition of Thomas A. Davies and others, asking for the like privilege, and agreeing to give the *city*, (in lieu of license fees,) one cent for each passenger thereon, the petitioners charging five cents fare.

*Third.*—A petition of Thomas A. Davies, D. H. Haight, and Stephen Storms, asking, on behalf of themselves and associates, the like privilege, and agreeing therefor to charge

each passenger three cents fare, or agreeing therefor to give the city \$100,000 per annum for ten years, with the privilege of charging each passenger five cents fare.

*Fourth.*—A petition of Thomas A. Davies and others, asking to have their names inserted in the present resolution in lieu of *Jacob Sharp* and others, therefor agreeing to reduce 70 the rate of fare authorized by the eleventh sub-division, to three cents for each passenger, and with such reduction in the rate of fare, agreeing to conform to such resolution and all the conditions imposed thereby. These petitioners, in their petition, offered to give satisfactory security for the fulfilment of their agreement, in such an amount as the Common Council might designate. Apart from this fact, all these petitioners are gentlemen well known in this community, possessing abundant means and wealth, and in all respects able to perform their *offers* and agreements. It certainly can require no 71 argument to convince the Common Council, that if they are vested with the power to establish a rail road in Broadway, and to confer the privileges contained in these resolutions, in exercising such a power, they should be governed by one of two principles:—

**FIRST.**—To realize therefrom the greatest amount of money for the benefit of the city and its tax-payers; or,

**SECOND.**—To produce the greatest benefit to the public at large, by the reduction of the rate of passenger fare to the lowest sum.

72 Assuming that for the purpose of *this* rail road, one hundred and fifty cars will be required under the resolution adopted by the Common Council, and submitted for my approval, the city could only derive the ordinary license fee of twenty dollars for each car, or three thousand dollars per annum, while Messrs. Jacob Sharp and others are authorized to charge five cents passenger fare.

By accepting the offer of Alexander T. Stewart, and others, mentioned above, the city would derive an annual income of one hundred and fifty thousand dollars, and the public would be benefited by being charged only three cents passenger fare.

73 By accepting the *offer* of Thomas A. Davies, and others, mentioned above, the city would derive, in my opinion, about one hundred and fifty thousand dollars per annum, while the public would be charged no higher rate of fare than is authorized by this resolution.

By accepting the offer of Thomas A. Davies, D. H. Haight, and Stephen Storms, the public generally would be benefited by their being charged only three cents per passenger, fare.

Or, the Corporation would derive an annual income of one hundred thousand dollars, and the public charged no higher rate of fare than is authorized by the resolution.

74 Or, *the* city would derive an annual income of one hundred and fifty thousand dollars, and the public charged no higher rate of fare than is authorized by this resolution.

By accepting the offer above mentioned, of Thomas A. Davies and others, the Corporation would derive precisely the same benefit and advantage it can derive under this resolution; while, on the other hand, the public would be benefited by being charged three cents instead of five cents passenger fare.

How, with such propositions before you, the privilege accorded in the resolutions under consideration, could have been granted on the terms therein set *forth*, I have been unable to 75 ascertain from a careful perusal of the papers submitted for my examination; and I cannot think that the community would tacitly submit to such a perversion of their rights.

I therefore return the papers for re-consideration, in the hope that more mature reflection will convince your honorable body of the propriety of the course which I have, from a sense of duty, been compelled to adopt.

A. C. KINGSLAND, *Mayor.*

## NEW-YORK SUPERIOR COURT.

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Thomas E. Davis and Courtlandt Palmer,	}
against	
The Mayor, Aldermen and Commonalty of	}
the City of New-York.	

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76 *City and County of New-York, ss.*

Malcolm Campbell, of said city, being duly sworn, says, that on December 31st, 1852, he served a copy of the annexed order, and the affidavits and papers annexed thereto, on the following Aldermen, viz. Thomas J. Barr, of the Sixth Ward ; William H. Cornell, of the Seventeenth Ward ; and John Doherty, of the Nineteenth Ward, by delivering to each of them a copy thereof, at the same time showing to each of them the original order.

MALCOLM CAMPBELL.

Sworn to, before me, this 15th day  
of January, A. D. 1853,

77                   GEORGE H. ELWELL, *Commissioner of Deeds.*

## NEW-YORK SUPERIOR COURT.

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Thomas E. Davis and Courtlandt Palmer, }  
 against }  
 The Mayor, Aldermen and Commonalty of }  
 the City of New-York. }

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*City and County of New-York, ss.*

Henry Hilton, of said city, being duly sworn, says, that on December 30th, 1852, he served a copy of the annexed order and affidavits and papers annexed thereto, on the following Aldermen, viz. Abraham Moore, of the First Ward; Dudley Haley, of the Second Ward; Oscar W. Sturtevant, of the Third Ward; Jacob F. Oakley, of the Fourth Ward; William M. Tweed, of the Seventh Ward; William J. Brisley, of the 78 Ninth Ward; Richard T. Compton, of the Eighth Ward; Wesley Smith, of the Eleventh Ward; and William J. Peck, of the Twentieth Ward; by delivering to each of said Aldermen a copy thereof, and at the same time showing to each of them the original order.

HENRY HILTON.

Sworn before me, this fifteenth day  
 of January, A. D. 1853,

H. H. RICE, *Commissioner of Deeds.*

## NEW-YORK SUPERIOR COURT.

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Thomas E. Davies and Courtlandt Palmer, }  
 vs. }  
 The Mayor, Aldermen and Commonalty }  
 of the City of New-York. }

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79

Upon the annexed affidavits, and on the summons, complaint, and injunction, served in this action, on the defendants :

It is hereby ordered, that Oscar W. Sturtevant, Abraham Moore, Dudley Haley, Jacob F. Oakley, Thomas J. Barr, William M. Tweed, Richard T. Compton, William J. Brisley, Wesley Smith, James M. Bard, Asahel A. Denman, William H. Cornell, John Doherty, and William J. Peck, show cause before one of the justices of this court, at a Special Term, to be held at the City Hall, in this city, on the second Monday 80 of January, 1853, at *ten o'clock, A. M.* why an attachment should not be issued against them, and each of them, for contempt of court, in disobeying the injunction issued and served on each of them in this action.

R. EMMET.

New-York, December 30, 1852.

## NEW-YORK SUPERIOR COURT.

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Thomas E. Davis and Courtlandt Palmer,  
*against*  
 The Mayor, Aldermen and Commonalty of  
 the City of New-York.

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*City and County of New-York, ss.*

Henry Hilton, one of the plaintiffs' attorneys in this action, being duly sworn, says, That on the evening of the 29th of December, instant, the *Board* of Aldermen of the City of 81 New-York met, and in defiance of an injunction order granted in this action, and annexed hereto, the following Aldermen, to wit, Abraham Moore, of First Ward; Dudley Haley, of Second Ward; Oscar W. Sturtevant, of Third Ward; Jacob F. Oakley, of Fourth Ward; Thomas J. Barr, of Sixth Ward; William M. Tweed, of Seventh Ward; Richard T. Compton, of Eighth Ward; William J. Brisley, of Ninth Ward; Charles Francis, of Tenth Ward; Wesley Smith, of Eleventh Ward; James M. Bard, of Fourteenth Ward; Asahel A. Denman, of Sixteenth Ward; William H. Cornell, of Seventeenth Ward; 82 John Doherty of Nineteenth Ward; and William J. Peck, of Twentieth Ward; composing a part of said Board, and a majority thereof, proceeded to and did pass and adopt a grant and resolution, authorizing and granting to Jacob Sharp and others, the right, liberty, and privilege of laying a track for a railway in the street known as Broadway, in said city, such grant and resolution being the same as the one annexed to the complaint in this action, and marked B.

83 Deponent further says, that said Aldermen *above* named, (with the exception of Charles Francis and John Doherty,) immediately thereafter passed and adopted a preamble and resolution, of which a copy is hereunto annexed, marked A.

And further, that each of said resolutions were adopted and passed upon the motion of said Sturtevant, who, at the time, stated that he had been served with said injunction, and had a copy of it in his pocket.

HENRY HILTON.

Sworn before me, this 30th day  
of December, A. D. 1852,  
R. EMMETT.

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A.

Alderman Sturtevant presented the following preamble and resolutions :

84 Whereas, the Hon. William W. Campbell, one of the Judges of the Superior Court, has, without color of law or justification, assumed the prerogative of directing and controlling the municipal legislation of this city, by issuing an injunction prohibiting the Mayor, Aldermen and Commonalty of the city of New-York, from performing a legislative act, supposed by him to be probably about to be performed, and summoning the said Mayor, Aldermen and Commonalty to appear before him, and show cause why the said injunction should not be perpetual. And whereas, the said injunction issued at the  
85 close of a session, and throwing forward the period of such

showing of cause beyond the expiration of the session, in regard to a measure which has been pending for months, bears on its face a character of indirection not less unjustifiable and not less unworthy of the judiciary than the usurpation of authority and jurisdiction which is contained in such an attempted injunction itself. And whereas, if the legislative act in question should prove, on judicial investigation, to be open to any objection or illegality or unconstitutionality, there would always exist ample opportunity for restraining its execution by injunction upon the first proceedings of the parties *authorized* to carry the same into effect. And whereas, 86 if such a precedent of unwarranted and unwarrantable interference with the rightful functions, powers and duties of a legislative body, attempted by a Judge, be submitted to, or tolerated without just rebuke, not only will the whole municipal legislation of this city, with its half million of inhabitants, be subjected to the caprice or interested views of any Judge who might be found willing to come forward with attempted vetoes in the form of injunctions, but the next natural step of judicial usurpation will be to arrest and veto in similar manner, the legislation of the State, or that of Congress, 87 on any Judge's opinion of constitutionality, expediency or motive, at the close of a session, when all business of importance is usually completed. And whereas, the reasons alleged therefor are equally untenable in law and unfounded in fact—

*Resolved*, That as this Common Council will not encroach on the lawful jurisdiction and powers of any other public authority or body, so also will it never allow any other to interfere unlawfully with its own, which it holds from the people, and which it is bound to exercise, according to *its* own judg- 88

ment, and on its own responsibilities, and not according to the views and directions of any judge or other individual citizen ; and that it is the duty of the Common Council on this unprecedented occasion to protect its own dignity and the rights of the people of the city of New-York, its constituency, by utterly disregarding the said injunction upon its legislative action, and declaring its sense upon the same.

*Resolved*, That the Common Council have an equal authority and right to suspect and impute improper motives to any intended judicial decision of any judge, and consequently to 89 *attempt* to arrest his action on the bench, as such judge has in regard to the legislative action of the Common Council.

*Resolved*, That in reference to measures against which the injunction in question is directed, it was adopted by the Common Council on grounds of public expediency, justice and right, for the best good of the city, both in regard to the accommodation and service of the public, and in regard to the interests of the city treasury, and also on petitions from more than thirty thousand citizens, and that nothing has yet 90 appeared which shakes the ground on which *it* was so adopted, and that we shrink from no discussion or investigation, judicial or otherwise, into the foundations of these grounds, and the reasons of our action, collectively or individually. Which was adopted by the following vote, *viz.*

Affirmative—Aldermen Moore, Haley, Sturtevant, Oakley, Barr, Tweed, the President, Aldermen Brisley, Smith, Bard, Denman, Cornell, Peck—13.

Negative—Aldermen Boyce, Francis, Ward, Doherty—4.

## NEW-YORK SUPERIOR COURT.

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Thomas E. Davis and Courtlandt Palmer, }  
 against }  
 The Mayor, Aldermen and Commonalty of }  
 the City of New-York. }

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City and County of New-York, ss.:

*William McMurray*, of said city, being *duly* sworn, says: 91  
 That on the 28th day of December, 1852, he served a copy  
 of the summons herein, together with a copy of the annexed  
 injunction order on Richard J. Compton, President of the  
 Board of Aldermen, and Alderman of the Eighth Ward; .  
 Dudley Haley, Alderman of the Second Ward; William J.  
 Brisley, Alderman of the Ninth Ward; Wesley Smith, Alder-  
 man of the Eleventh Ward; and James M. Bard, Alderman  
 of the Fourteenth Ward; by delivering to and leaving with  
 each of said Aldermen, respectively, a copy of said summons  
 and injunction *order*, at the same time showing to each of 92  
 them the annexed original injunction order.

And also that on the 29th day of December, 1852, he  
 served a copy of said summons and injunction order on Abra-  
 ham Moore, Alderman of the First Ward; William M.  
 Tweed, Alderman of the Seventh Ward; and William H.  
 Connell, Alderman of the Seventeenth Ward; by delivering

to and leaving with each of them, respectively, a copy of said summons and injunction order, at the same time showing to each of them the annexed original injunction order.

93 And also, that *on* the 28th day of December, 1852, he served a copy of the summons and complaint in this action, and of said injunction order, on Ambrose C. Kingsland, Mayor of the City of New-York, by delivering to and leaving with said Mayor a copy thereof, at the same time showing to him the annexed original order.

(Signed,) WM. McMURRAY.

Sworn before me, this 30th day  
of December, A. D. 1852,  
CHAS. FRASER, Com. of Deeds.

## NEW-YORK SUPERIOR COURT.

Thomas E. Davis and Courtlandt Palmer, }  
 against }  
 The Mayor, Aldermen and Commonalty of }  
 the City of New-York. }

94

City and County of New-York, ss.:

Malcolm Campbell, of said city, being duly sworn, says: That on the 29th day of December, 1852, he served a copy of the summons herein, together with a copy of the annexed injunction order, on Oscar W. Sturtevant, Alderman of the Third Ward; Jacob F. Oakley, Alderman of the Fourth Ward; John Boyce, Alderman of the Fifth Ward; Thomas J. Barr, Alderman of the Sixth Ward; S. L. H. Ward, Alderman of the Fifteenth Ward; Asahel A. Denman, Alderman of the Sixteenth Ward; Alonzo A. Alvord, Alderman of the 95 Eighteenth Ward; John Doherty, Alderman of the Nineteenth Ward; and William J. Peck, Alderman of the Twentieth Ward, by delivering to, and leaving with each of said aldermen respectively, a copy of said summons and injunction order, at the same time showing to each of them the annexed original injunction order.

MALCOLM CAMPBELL.

Sworn before me, this 30th day of

December, A. D. 1852,

CHAS. FRASER, Com. of Deeds.

## NEW-YORK SUPERIOR COURT.

*City and County of New-York.*


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96 Thomas E. Davis and Courtlandt Palmer,  
   *against*  
   The Mayor, Aldermen and Commonalty of  
   the City of New-York.                            } *Summons.*

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*To the Mayor, Aldermen and Commonalty  
   of the City of New-York:*

You are hereby summoned and required to answer the complaint in this action, which will be filed in the office of the Clerk of the said Court, at the City Hall, in the said City, and to serve a copy of your answer to the said complaint on the subscribers, at their office, No. 44 Wall street, in the City of New-York, within twenty days after the service of this  
 97 summons on you, *exclusive* of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiffs in this action will apply to the Court for the relief demanded in the complaint.

Dated New-York, Dec. 27th, 1852.

McMURRAY & HILTON,  
*Plaintiffs' Attorneys.*

## NEW-YORK SUPERIOR COURT.

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Thomas E. Davis and Courtlandt Palmer,  
*against*  
 The Mayor, Aldermen and Commonalty of  
 the City of New-York.

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It appearing from the complaint in this action, duly verified, that the plaintiffs are entitled to the relief demanded in the said complaint, and that *such* relief consists in restraining the 98 defendants, as hereinafter provided :

Now, therefore, in consideration of the premises, and of the particular matters in said complaint set forth, I do hereby command and strictly enjoin the said defendants, the Mayor, Aldermen and Commonalty of the City of New-York, their counsellors, attorneys, solicitors and agents, and all others acting in aid or assistance of them, and each and every of them. That they and each of them do absolutely desist and refrain from granting to, or in any manner authorizing Jacob Sharp and others, (the persons named in the resolution, of which a copy is annexed to said complaint, and marked B.) or 99 their associates, or any other person or persons whomsoever, the right, liberty, or privilege of laying a double, or any tract for a railway in the street known as Broadway, in said City of New-York, from the South Ferry to Fifty-seventh street, or any railway whatsoever in said Broadway; and from breaking or removing the pavement in said street, or in any other manner obstructing said street preparatory to, or for the purpose of laying or establishing any railway therein, until the further order of this *court* in the premises. 100

And that the defendants show cause, at a Special Term of this court, to be held at the City Hall, in the City of New-York, on the second Monday of January, 1853, at the opening of the court on that day, or as soon thereafter as counsel can be heard, why this injunction order should not be made perpetual.

Dated New-York, Dec. 27th, 1852.

WILLIAM W. CAMPBELL.

TAKE NOTICE:—That the foregoing is a copy of an Injunction Order this day granted in the above entitled action.

101 Dated New-York, Dec. 27th, 1852.

Yours, &c.

McMURRAY & HILTON, *Plaintiffs' Attorneys.*

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SUPERIOR COURT.

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Thomas E. Davis and Courtlandt Palmer,	}
against	
The Mayor, Aldermen and Commonalty of	}
the City of New-York.	

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*City and County of New-York:*

Jacob Sharp, Freeman Campbell, William B. Reynolds, James Gaunt, I. Newton Squire, William A. Mead, David Woods, John L. O'Sullivan, Wm. M. Pullis, Jonathan Roe, John W. Hawkes, James W. Faulkner, Henry Dubois, John J. Hollister, Preston Sheldon, John Anderson, John R. Flana-

gan, Sargent V. Bagley, Peter B. Sweeney, Charles B. White, James W. Foshay, Robert E. Ring, Thomas *Ladd*, Concklin 102 Sharp, Samuel L. Titus, Alfred Martin, D. Randolph Martin, Wm. Menzies, Charles H. Glover, and Gershon Cohen, being severally sworn, say, each for himself, that, to the best of his knowledge, information and belief, no member of the Common Council has now, or has ever had, any interest, direct or indirect, in the grant to these deponents of the right or privilege of constructing a railway in Broadway; nor has any of them ever received, been promised, or given to expect, any money, property, or reward of any kind, for his vote, countenance, or influence in *favor* of the said grant. 103

JACOB SHARP,	JOHN ANDERSON,
FREEMAN CAMPBELL,	J. R. FLANAGAN,
W. B. REYNOLDS,	S. V. BAGLEY,
JAMES GAUNT,	PETER B. SWEENEY,
I. NEWTON SQUIRE,	CHARLES B. WHITE,
WM. A. MEAD,	J. W. FOSHAY,
DAVID WOODS,	ROBERT E. RING,
J. L. O'SULLIVAN,	THOS. LADD,
WM. M. PULLIS,	CONCKLIN SHARP,
JONATHAN ROE,	SAML. L. TITUS,
JOHN W. HAWKES,	ALFRED MARTIN,
JAS. W. FAULKNER,	D. RANDOLPH MARTIN,
HENRY DUBOIS,	WILLIAM MENZIES,
JOHN J. HOLLISTER,	CHARLES H. GLOVER,
PRESTON SHELDON,	GERSHON COHEN.

Sworn before me, this 10th, 11th, and 12th  
days of January, A. D. 1853,

SYLVESTER LAY,  
*Commissioner of Deeds.*

## SUPERIOR COURT.

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Thomas E. Davis and Courtlandt Palmer,  
*against*  
 The Mayor, Aldermen and Commonalty of  
 the City of New-York.

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*City and County of New-York:*

104 Jacob Sharp and John L. O'Sullivan, both of the City of New-York, being *severally* duly sworn, say: That the said Jacob Sharp is the President, and the said John L. O'Sullivan is the Vice-President, of the Broadway Railway Association; an association formed, pursuant to the resolution of the Common Council, authorizing the construction of a railway in Broadway; and that they have had cognizance generally of the proceedings to obtain permission of the said Common Council to construct the said railway, and to organize said association.

105 That, in the opinion of these deponents, the construction of said railway, according to the terms of the said resolution, will not only not be a *nuisance*, but will be a great public benefit, both to the persons living and doing business on Broadway, and to the citizens generally; and that the following are some of the reasons for such opinion:

Broadway is now so crowded with vehicles, particularly at certain hours of the day, as to lead to excessive confusion and

danger, and frequently to great detention, and injury to person and property. The annexed tables exhibit the facts therein set forth, according to observations which these deponents caused to be carefully and faithfully made, at two different periods, namely, August and October of *last* year. From 106 these facts, it is evident that the passenger travel on Broadway urgently needs the provision of some improved means of conveyance, which shall move it in a reduced number of vehicles, and with a less occupation of the street. The complement of an omnibus is usually twelve passengers. The grant in question authorizes the construction of cars comfortably adequate in dimensions to the conveyance of eighty passengers; and these deponents are informed and believe, that the same can be moved by a single pair of horses, and will leave generally on each side space within which *two* 107 carriages can move abreast; besides, that the rails will afford no impediment to the free movement of vehicles across and upon the middle portion of the street. The maximum number of down passengers now conveyed in any hour, according to the statistics observed, and already referred to, being 2,016, and the maximum number of up passengers 2,808, (for which are used, in the former case, 270 omnibuses, and, in the latter case, 271 omnibuses, per hour,) the number of cars, of eighty-passenger capacity, which would move the same, *would* be, 108 in the one instance, 26; and in the other instance, 35. Cars of sixty-passenger capacity being employed, these respective numbers, sufficient for the maximum hours of the travel, would be 34 and 47. And if it is assumed that a number of cars be employed equalling only one-third of the number of omnibuses now required for the aforesaid amount of travel, namely, 90 cars per hour, the number of passengers which they would

be adequate to convey in the hour would be, instead of 2,016  
109 or 2,808, as follows, namely: 5,400 (with cars of 60-passenger capacity), or 7,200 (with cars of 80-passenger capacity.) When this great increase of public accommodation is viewed in connection with the great reduction in the number of vehicles moving it, and consequently in the amount of occupation of the carriage-way, these deponents consider the relief to Broadway, which will be afforded by the intended railway, to be a matter of absolute and conclusive demonstration.

And these deponents further say, that many other reasons  
110 conduce to the conviction entertained by them, that the said railway will be a great public benefit, to the relief of Broadway, to the accommodation of the people, to the improvement of business and travel on the said street, and to the general good of the city, besides those which have been mentioned above; and they refer to the Report of the Select Committee of the Board of Aldermen on this subject, made to the Board on the 15th November last, document No. 57, for a more particular statement thereof; of which a copy is hereto annexed.

111 In reference to the other applications for the said grant referred to in the complaint in this cause, the deponents say, that they do not believe, and have never believed, those applications to have been made in good faith, for the purpose of building the said railway; but believe them to have been mere devices, designed for the purpose of preventing the defendants from succeeding in obtaining the said grant, and for the purpose of getting the said grant into the hands of parties, whose hostility to the proposed measure in itself had

been frequently and strongly avowed, and was still avowed as being unchanged at the very time of making said applications. Those applications proceeded either altogether from the known and public opponents of the measure, or from them united with a few other names of applicants on the same memorials. The said memorials were two in number, addressed to the Board of Aldermen; and five subsequently addressed to the Board of Assistants, after the passage of the grant in the former Board. Among the most prominent opponents of the measure, during the progress of the controversy conducted before the Common Council and the public, were Thomas A. Davies, D. Henry Haight, Stephen Storms, Philip Burrowes and Alexander T. Stewart; and (with one exception) all the said applications proceeded from some or others of those citizens, or from some or others of them in connection with other names as signers. The one exception alluded to, was an application from the attorneys, who had been already retained by some of the said citizens to oppose, and if possible, defeat, the grant solicited by and granted to the defendants, and who are the plaintiffs' attorneys in this cause. Throughout the controversy alluded to, the general grounds of opposition, and language of the said opponents of the measure were, that a *railway* was impracticable in Broadway; that it was illegal, and that the Corporation had no power to grant such permission; that it would be a public nuisance; that it would be abated as such by the courts, or torn up by the just indignation of the people; and that it would be destructive to the business, and very injurious to the rents and value of property on Broadway, in which those opponents were largely interested. They, or some of them, frequently declared, that they would spare no expense nor effort to pre-

115 vent the consummation of what they *thus* regarded as an illegal outrage and abomination. These deponents and their associates, therefore, did not believe the counter-offers proceeding from those same quarters, for the same grant, to be sincere *bona fide* offers, such as were entitled to the consideration of any legislative body ; and they believed, and believe, that their real character was manifestly visible on their face. And that belief and conviction became the greater certainty, from information reaching these deponents, through different channels, respecting the acts and declarations of some or others of the said combined opponents of the railway project. 116 Through such evidences and *reliable* sources of information, these deponents were informed and believe :—

That a lot on Broadway had been sold by one of the said opponents (Mr. Burrowes) to another gentleman, residing in New Jersey, connected with him in business in his office (Mr. Harrison,) as deponents were informed and believe, with a view to suing out an injunction in the United States Courts, against the prosecution of the said grant, the said Courts not being bound by the law respecting city railways already declared by the Supreme Court of this State ; and that counsel 117 had been consulted, and papers prepared therefor, a considerable time before the passage of the grant in the Board of Aldermen.

That another (Mr. Davies) had concerted with the leading representatives of the omnibus opposition to the said application, that they should both allow counter-offers, and applications for the grant to stand before the Common Council, and that whichever of the two should get it (namely, whether Mr.

Davies, with his associates, Messrs. Haight, Storms, and others, or the omnibus proprietors,) it could then be killed by injunction, the understanding being, that the party holding the grant would not oppose any effectual defence against the same, *and* that if the former party should get it, on their 118 pending offer, they would transfer it to the omnibus proprietors, with that view.

And again, that after the report of the Committee of the Board of Aldermen (in favor of the measure and of the application of the defendants,) another of the said leading opponents (Mr. D. Henry Haight) had gone to the chairman of said committee (Alderman Sturtevant,) and had complained that the said report was unfair, and placed him (Haight) in a ridiculous light in this respect, namely, by referring to the applications for the grant which *had* proceeded from the former opponents of the projected railway, and by deducing therefrom an argument in favor of the said project, founded on the presumed change of mind in such opponents, in regard to the merits of the said project; that the said Haight then said to the chairman, words to the following effect: "You know that I don't want any rail road, and you ought to have known, and I have no doubt did know, *that the only object of the application was to kill it.*" 119

And this understanding and conviction, respecting the true character and object of the said *counter* applications, were 120 not at all affected by the circumstance, that they were accompanied with tenders of security; because it was manifest, that such securities would have no application to contracts or engagements, the performance of which was to be arrested

by legal injunction. And therefore these deponents and their associates continued, notwithstanding these counter offers, to urge their own application, as an advantageous and proper petition to be granted, for the general benefit of the public and the city, and for the relief of Broadway, the applicants therefor being sincere in their intention and ability to carry  
121 into *effect* the object of the grant in question, and to defend it against all the attacks, by litigation or otherwise, with which it was threatened by its enemies.

And these deponents further say that, in their opinion, the said other applications, even if they had been made in good faith, and had been carried out, would have been less burthensome to the grantees in the amount of money to be expended, and less beneficial to the citizens, than the one to the present grantees; and for these reasons among others. None of the other applications excepting one, as it appears  
122 *from* the Mayor's veto, proposed to take the grant upon the same terms and conditions as the one to the said grantees, which terms and conditions these deponents believe to be more burthensome than the payment of any bonus offered by the other applicants. And as to the one application, which offered to take the grant on the same terms and conditions, with three cents fare, it was not accompanied by any purchase, or offer to purchase, out the lines of omnibuses on Broadway. Whereas the applicants, with whom these deponents are connected, had, through their representatives,  
123 made contracts *with* the owners of six of the principal omnibus lines on Broadway, owning 241 omnibuses, to buy out those lines, for the purpose of withdrawing the said omnibuses from Broadway, and with a view to transferring them

to transverse lines, at convenient intervals, from river to river, to run in communication with the railway ; contracts to an amount of nearly half a million of dollars, and leading to still greater outlay. Because this course was a measure of justice and proper public policy in itself ; a necessary condition for the successful working of a railway in Broadway at *all* ; a great enhancement of the public accommodation, 124 which would be afforded by a railway on the line of Broadway ; and leading to great improvement in the taxable values of all property on the cross streets and lateral regions of the city, which would be traversed and accommodated with these useful public facilities ; and because the case of the applicants, with whom these deponents were connected, was the only one which presented itself before the Common Council with this important and valuable feature ; a feature, greatly surpassing in importance and value, the offers of bonuses contained in any of the aforesaid counter offers, even if there had 125 not existed the cogent reasons before mentioned, for distrust and disbelief of the sincerity of those counter offers.

JACOB SHARP,  
J. L. O'SULLIVAN.

Sworn before me, this 12th day of  
January, 1853,  
C. B. WHEELER, Com. of Deeds, 4 New street.

# OMNIBUS STATISTICS OF BROADWAY,

Observed and Recorded on the 6th, 7th, 9th and 10th of August, 1852.

Hour beginning at	Omnibuses passing Museum.	Average of passengers per Omnibus Up.		The same Down.		Number of passengers Up.		The same Down.	
		Up.	Down.	Museum.	Canal street.	Museum.	Canal street.	Museum.	Canal street.
126	7	189	251	1.78	2.94	5.66	8.87	335	407
	8	220	270	2.36	2.75	7.46	11.50	526	418
127	9	263	265	2.72	4.60	6.52	9.50	717	796
	10	233	249	3.38	5.63	5.62	8.14	789	941
128	11	228	239	4.72	7.13	5.10	6.72	1078	1215
	12	281	225	4.44	7.36	5.15	6.49	1245	1259
129	1	201	226	5.31	7.00	4.95	8.38	1069	1134
	2	196	244	5.88	7.12	6.02	7.90	1153	1175
130	3	240	234	6.04	7.85	5.01	8.08	1450	1246
	4	237	220	6.53	11.13	4.62	6.42	1550	1837
	5	254	233	7.29	10.51	4.30	5.58	1844	1724
	6	271	256	10.36	10.83	3.25	4.26	2808	1788
	7	240	250	10.31	11.71	3.36	3.73	2475	2050
								17039	16444

The entire licensed number of omnibuses for the lines entering Broadway, was 509. This proves that the table exhibits the *entire omnibus force* in active work. 131 And since, at the hours of the heavy travel, the table exhibits them as *running full*, this proves that the above amount of travel is all that is done, or can be done by the omnibus force on Broadway.

## STATISTICS observed and recorded in October, 1852.

Hour beginning at	Omnibuses.				All other Vehicles.				Total Omnibuses.		Total other Vehicles.		
	Museum.		Leonard St.		Museum.		Leonard St.		Museum.	Leonard St.	Museum.	Leonard St.	
	Up.	Down.	Up.	Down.	Up.	Down.	Up.	Down.					
132	7	166	204	100	143	161	326	64	100	370	243	457	164
	8	230	247	147	177	256	618	55	122	477	324	874	177
133	9	246	245	175	136	375	460	77	142	491	311	835	219
	10	251	242	172	164	418	468	81	167	493	336	886	248
134	11	252	265	155	173	396	478	67	155	517	328	874	222
	12	243	230	169	164	345	322	100	132	473	333	667	233
135	1	205	225	164	169	414	454	110	172	500	333	868	282
	2	251	249	162	168	431	485	106	144	523	330	916	250
136	3	256	267	164	169	490	401	102	144	514	333	891	246
	4	254	260	148	173	638	274	95	98	528	321	912	193
	5	259	269	130	195	370	88	55	41	535	325	458	96
	6	281	254	151	181	71	23	34	34	522	332	94	68
	7	239	283										
	3,133	3,240	1,989	2,176	4,719	4,723	1,075	1,611	6,373	4,165	3,442	2,686	206
137	Average, per hour.								490	320	726		

## SUPERIOR COURT.

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Thomas E. Davies and another,	} <i>vs.</i> The Mayor, &c. of the City of New-York.
The Mayor, &c. of the City of New-York.	

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*City and County of New-York.*

Robert Barkley, being sworn, saith, that while the application for the Broadway railway was pending before the Common Council, he had frequent interviews with Thomas A. Davies and Philip Burrowes, active opponents of the said railway, this deponent being then himself also an opponent of the same. In some of these interviews, Mr. Burrowes told this deponent, that he had sold a lot in Broadway to a person residing out of the State, in order *that* an injunction against 138 the railway might be obtained in the United States Court. In previous interviews, during the last summer, he told deponent, that the papers were ready for an injunction against the road, and were then in the hands of counsel; and that the injunction was all prepared.

And this deponent further saith, that he was cognizant generally of the plans and movements of the opponents of the road; that one of the plans was, that one party should apply for and get the grant, if possible; and then that the other party should kill it by an *injunction*. That Mr. Davies stated 139

to this deponent, that it was the intention of the opponents to kill the project, by one party getting an injunction against the other, and then letting the same lie. That when this deponent, and his friends interested in omnibuses, and in opposing the railway, were about to apply for the grant, in opposition to the one made to the present grantees, the said Davies offered to withdraw the application then pending on the part of himself and others, and let this deponent and his friends obtain 140 the grant; and stated that then he, *the* said Davies and his associates, would procure an injunction against it. And that, in one of the conversations, the said Davies proposed, that if this deponent and his associates would pay his counsel one thousand dollars down, and a thousand dollars yearly, as long as he might keep the road off, until it amounted to a sum not exceeding five thousand dollars, he would keep the road off for a number of years, if he did not defeat it altogether; and he said, that he thought the Common Council might have the 141 power to lay the rails, but *that* the running of the cars could be stopped; because they were a nuisance, for the reason, that they could not turn to the right, and the law required all vehicles to turn to the right.

ROBERT BARKLEY.

Sworn before me, this 12th day of

January, 1853,

W.M. H. SPARKS, *Commissioner of Deeds.*

*City and County of New-York:*

Daniel D. Conover, being sworn, saith, that he has read the foregoing affidavit of Robert Barkley; that this deponent was present at the several interviews therein mentioned; and 142 that he knows the statements made in said affidavit to be *true.*

And this deponent further saith, that the said Burrowes also told him, that the person to whom the lot on Broadway was conveyed, for the purpose of obtaining an injunction, was employed in his office, and lived in New Jersey.

And this deponent further saith, that he was cognizant generally of the plans and movements of the opponents of the railway; and that one of the plans agreed upon was, that one party of the opponents should apply for and obtain the grant, if possible, and that the other party should kill it by an injunction. That among the most *active* opponents of the 143 road were, Thomas A. Davies, Philip Burrowes, D. Henry Haight, Alexander T. Stewart, and Stephen Storms; and that on the evening on which the resolution was first reported in the Board of Aldermen, the said Storms had a conversation with this deponent, in which the said Storms stated, that he had come to ask this deponent's influence to procure for him admittance into the Broadway Railway Association. That in his application for the grant, he had been made a cat's paw of, or something to that effect, and placed in a false position; and that he could *be* serviceable to the association, and as a 144 man of fortune and leisure, would make a useful president of it.

D. D. CONOVER.

Sworn before me, this 12th day of  
January, 1853,

Wm. H. SPARKS,  
*Commissioner of Deeds.*

City and County of New-York.

EBEN S. YOUNG, being sworn, saith, that he was present at the interview with Thomas A. Davies, mentioned in the foregoing affidavit of Robert Barkley, respecting the proposed arrangement to keep off the road for five years, and that the statements of the affidavit in that respect he knows to be true.

145

EBEN S. YOUNG.

Sworn before me, this 12th day of

January, 1853,

Wm. H. SPARKS, Com. of Deeds.

## SUPERIOR COURT.

---

Thomas E. Davis and another,	}
against	
The Mayor, Aldermen and Commonalty of	}
the City of New-York.	

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City and County of New-York :

OSCAR W. STURTEVANT, Chairman of the Special Committee appointed by the Board of Aldermen on the sixteenth day of July, A. D. 1852, on the subject of a Rail Road in Broadway, being sworn, doth depose and say :

That very shortly after the making of the Report on the said subject, and *before* it was acted upon by the Board, Mr. 146 D. Henry Haight came to this deponent's office, and complained that the said report was unfair, in deducing an argument in argument in favor of a project of a rail road in Broadway, from the fact, that some of its prominent opponents, including the said Mr. Haight, had come in with applications and offers for the grant to be made to themselves. He stated, that this placed them in a ridiculous position, and he said : "You know that I don't want any rail road in Broadway, and you ought to *have* known, and I have no doubt you did know, 147 that the only object of the application was to kill it," or words to that effect.

OSCAR W. STURTEVANT.

Sworn to, this 11th day of January, 1852,

before me,

S. L. H. WARD, Com. of Deeds.

## NEW-YORK SUPERIOR COURT.

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Thomas E. Davis and another,	}
against	
The Mayor, Aldermen and Commonalty	}
of the City of New-York.	

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City and County of New-York, ss.

HENRY B. DAWSON, of the said city and county, being sworn, deposes :

148 I was employed by Jacob Sharp and others, applicants *for* the grant of permission from the Common Council, to lay a railway in Broadway ; in pursuance of which application the said permission has been granted to them and their associates, to superintend and direct, in the months of July, August, September and October last, the business of circulating petitions for signature in favor of said project and application. I accordingly employed agents or canvassers for that purpose, and received from them, respectively, from time to time, their returns of signatures procured to such petitions or memorials. In pursuance of the instructions received by me from my employers, I *gave* to all of the said agents strict, and frequently repeated instructions, to present such memorials for signature only to legal voters, so far as it should be in their power to distinguish the same, with the sole exception of authorizing the taking the names of females, who should be the tenants or occupants at the head of stores or houses on the line of Broadway, to receive none but *bona fide* names of petitioners, and to employ nothing but fair and truthful representations in

applying for signatures, and to append in all cases the residence to each name. In *order* to prevent the existence of 150 any motive on the part of the said agents to multiply names on such memorials untruly, their compensation was not made proportional to the number of names procured by them, but it was fixed per diem, according to their time occupied. Respectable persons were selected for the said employment, and from their assurances, from time to time given to me, and from the opportunity for observation afforded by my position, as directing and supervising the said business, I have no doubt, that these instructions were faithfully and systematically executed, with as small a number of *occasional* possible 151 deviations therefrom, as is consistent with such an operation, on so large a scale. The said canvassers in general reported to me, as the result of their several observations, a growing progress of opinion found by them to take place in favor of the projected railway, many changes of opinion taking place in its favor, and very few, if any, against it. And to the best of my recollection and belief, the number of signatures thus procured to petitions in support of said application, before I was directed to desist from procuring more, was about thirty-one thousand eight *hundred* and fifty-seven; that the number 152 of such signers on the line of Broadway, being chiefly occupants or tenants, doing business on said street, was about sixteen hundred and seventy-nine; that in the lower part of Broadway, below Fulton street, a large majority of such occupants, doing business, petitioned in favor of the railway; and a majority on the whole line of the street, to the best of my knowledge and belief.

HENRY B. DAWSON.

Sworn before me, this 13th day of Jan. 1853,  
Wm. H. SPARKS, Com. of Deeds.

## SUPERIOR COURT.

153      Thomas E. Davis and another,  
                     *against*  
     The Mayor, Aldermen and Commonalty of  
     the City of New-York.

City and County of New-York:

EDWIN SMITH, of the said city, being sworn, saith, that he is by profession a civil engineer, and has been much engaged in the laying of railways in the city of New-York, and that he, as engineer, has superintended the construction of the Sixth and Eighth Avenue rail roads, and the re-laying of the Harlem rail road from the City Hall, Park, to Twenty-seventh street.

154      If all the materials were procured and ready, the railway in Broadway, from *the* Battery to Union Square, could, by proper disposition of the force, be laid in two months from the time of first breaking the pavement; and this can be accomplished without serious interruption of the travel, as the space to be taken up need not exceed fifteen feet, and there will be room left on each side generally sufficient for carriages to pass each other. The Russ pavement on each side of the fifteen feet opening, need not be disturbed, and the space taken up can be restored in as good condition as before.

155      This deponent measured the carriage-way of Broadway at all the intersecting streets on the tenth day of January instant, and found the width at Morris street to be forty-four feet nine inches; at No. 39 Broadway, forty feet six inches; at Exchange Place, thirty-seven feet; at Rector street, thirty-four feet four

inches, this being the narrowest point found. At Wall street, the width was thirty-five feet nine inches; at Pine street, thirty-eight feet; from Thames to John street, thirty-nine feet six inches; from Fulton to Warren street, forty-three feet; from Warren to Reade street, *forty-two* feet; from Duane to 156 Anthony street, forty-one feet; from Leonard to Canal street, forty-two feet; from Canal to Bleecker street, forty-five feet; from Bleecker street to Waverly Place, forty-two feet; from Waverly Place to Tenth street, forty-four feet, and from Tenth to Fourteenth street, forty-two feet.

Under the provisions of the resolution of the Common Council, giving the privilege of constructing the railway to Jacob Sharp and others, the cars can be so constructed as to carry forty passengers inside and forty on the top, without risk or inconvenience, which *cars* can be drawn by two horses. 157

The rail laid in accordance with the provisions of the said resolution, being even with the pavement, and having a groove not exceeding an inch in width, will, in my opinion, offer no impediment or inconvenience to any ordinary vehicle, passing on Broadway, there being no wheels used on common light carriages less than an inch wide, and most of them being an inch and a quarter wide, except light racing wagons and sulkeys.

In the judgment of this deponent, having regard to the number of passengers seeking conveyance on Broadway, and the *number* of vehicles now crowding there, the substitution 158 of cars under this resolution for omnibuses, will be a certain relief to Broadway and benefit to the public.

EDWIN SMITH.

Sworn, January 13, 1853, before me,

W. H. STOGDILL, Com. of Deeds.

## TO THE LAW COMMITTEE OF THE BOARD OF ALDERMEN.

Gentlemen,—In reply to your request for a copy of that part of my treatise, now owned by the Corporation, which relates to the estate and rights of that body in the streets of 163 the city, I beg to observe, that it is impossible to furnish it *at large* by the time requested. It comprises extracts from deeds, charters, statutes, and numerous documents, occupying some fifty pages. I send, however, an abstract of those documents, and a copy of the propositions and conclusions arrived at, in the words used in the work.

The history of the acquisition of a right in the streets by the municipal authority, and the modes of opening them, may be divided into four periods: The first, from the settlement of the city to the surrender to the English, in 1664. The second, 164 from that time to the charter of 1686, and the Colonial Act of October, 1691. The third embraces the subsequent time down to the great scheme of the statute of 1807, laying out the island in avenues and streets; and the fourth, from that time to the present.

(1.) The sources of information, during the first period, which have been resorted to, and are stated at length in the work, are the following:

1st. The ground briefs and transports of the Dutch government; a list of which is to be found in the 2d volume of Dr. 165 O'Callaghan's History, with whose aid they have been examined.

2d. The confirmatory patents issued by Nichols and other English governors, after the surrender, which usually recite the ground briefs. These I have examined in the office of the Secretary of State, at Albany, and made copious abstracts of them.

3d. The records of the Clerk's office in New-York.

4th. A list of the inhabitants, and the streets in which they resided, made in 1665, for the purpose of laying an assessment, as a substitute for billeting the English troops.

5th. A similar list, made in 1677. The *first* division of the 166 city into wards, made in 1683, shows authentically several of the streets, as then laid out.

6th. The records, in the office of the Clerk of the Common Council, of the Director-General and his council, and of the Burgomasters and Schepens, during the period in question.

Among these, is an ordinance of the 25th July, 1647, and another of the 15th January, 1655, showing the power exercised over the streets. Another act of great moment is a petition by the Burgomasters *and* Schepens, of the 20th December, 1657, followed by an apostle of the Director-General and Council, dated the 26th January, 1658, declaring, that they had granted and conveyed to the Burgomasters the unconceded lots within the city walls. 167

The most material of these documents, however, is an act of the Lord Director-General and Lord Councillors of New

Netherlands, of the 25th January, 1656 ; part of which I copy at length :

168 "Having this day resumed the survey of the streets of the city, as they heretofore, *in* the assembly of the Director-General and Council of New Netherlands, were designed in the map or plan, and laid out and set off into streets and palisades, according to the same, the Director-General and Council confirmed for ever the survey aforesaid, without changing the same. Therefore, the advancement of the same was referred to the Burgomasters of the city. They were directed to affix a notice, and determine a time at which all and every who may be abridged or injured by the aforesaid survey, shall inform the Burgomasters of the extent of their 169 damage, and to agree, *for* the advantage of the city, on the lowest price."\*

Several ordinances and acts of the Burgomasters and Schepens are then detailed under date of the 7th of October, 1656, and 3d of May, 1657, the 20th December, 1657, and others, showing how the important ordinance of 1656 was executed. Applications were made for a settlement of damages occasioned by the survey. Among these was one to his Worship, Anthony Alvord, who was a Burgomaster, and received three hundred guilders for a part of his garden.

170 As a *matter* of fact, I deduce from a careful collation of the materials referred to, that the streets, as they existed in 1664,

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\* Unfortunately, this important map cannot be found. Dr. O'Callaghan informs me, he has searched for it in vain ; and Mr. Valentine has never seen it.

whether laid out before the survey of 1656, or laid out or remodelled at the survey, are substantially the same as they appear on the map of 1695, (see Valentine's Manual, 1852.) A marked exception is Niew street, which does not appear to have been made in 1665, and was so in 1681 ; and is made a boundary point in the division of the wards in 1683. I am 171 speaking now solely of streets to the south of Wall street.

Again, I have been unable to find, prior to 1647, any evidence of any street below Wall street, being laid out through ground previously granted ; and I think it may be justly inferred that the principal streets at least, were occupied and defined by public authority or usage, without the soil ever having been included in any grant. The Beaver graft, (Broad street) for example, was naturally formed by pursuing the line of the creek which set up it ; artificially securing its banks, 172 and building on either side. The Prince's graft, (Beaver street) was similarly situated for some extent ; and De Heere straat, (Broadway,) naturally followed that ridee of ground which, up to Wall street, and, indeed much further, left a space for a street, and room on each side for buildings, before it dipt to the westward and eastward towards the rivers. It is certain, that from the earliest record the space before the fort was kept open, and used a public market place. This is now the Bowling Green.

The sixth article of the conditions, granted by the city of 173 Amsterdam, in 1657, and an act of the Director-General and Council of the fifteenth January, 1658, are also referred to.

"The treatise then proceeds :

From the facts and documents thus detailed, I think that the following propositions are deducible :

1. That the streets below Wall street, which were laid out under the Dutch Government, before the surrender of 1664, were either laid out through land belonging to the public authority before 1656; or being before trodden and used as 174 public paths, were recognized in the survey of 1656; or were laid out after a grant of land to individuals, taking part of the land granted, as to some extent was done in 1656. The great probability is, that the streets were laid out generally through land still remaining in the government.
2. That the survey of 1656 recognized some streets as previously existing; and wherever it made an alteration in such, or laid out any new ones, it proceeded from the principle of making adequate compensation to the owners for any damage 175 sustained. This was done in the *legal* method of arbitration then known.
3. The recognized principle of making compensation found in this public act of 1656, entitles us to conclude that if, in laying out any streets before that time, land had been taken included in a previous grant, that land had been paid for.
4. And in any event, and as to all streets laid out under the Dutch rule, the ownership of the street was entirely in the public authority. It is needless to inquire whether this authority was the city of Amsterdam, the West India Company, or

the municipal government of New Amsterdam. There was 176 no estate or right of reverter, or otherwise, left in the adjoining owners, even where their land had been taken originally.

By the civil law, generally adopted as the law of Holland, the highways, *vivæ publicæ*, belong to the sovereign power, as part of the royal ties or public rights. They belong to it absolutely. There is no right in the adjacent owners for a restoration, upon closing or otherwise. (a)

Frederician Code, vol. 1, p. 401, 402.

The case of Renthorp vs. Bourgh.

3 Martin's Louisiana Rep. 97; Digest, 43, 8, 2, 21.

The Dutch brought with them the laws of Holland. They 177 looked steadfastly to these as their guides. All through their records are striking exhibitions of the admiration and respect with which they regarded the laws, and modelled their own institutions upon the rules and "the precious customs of fatherland."

In the next place, I submit, that the surrender, in August, 1664, operated to vest this public right or royalty in the Duke of York, under his grant from crown, of March, 1664. There was no right existing in any individual owner. It was, therefore, transferred to the public power, somewhere represented. 178 Every such interest and dominion passed to the conqueror.

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(a) Sec. 3d, Kent's Com. p. 432, ed.

This would have been the King of England; but that he had conferred the right upon the Duke of York.

When, then, Dongan, the governor of the Duke, in the exercise of all the authority which the Duke or the King could have exercised, granted and transferred, by the charter of 1686, all the streets in the city of New-York to the Mayor, Aldermen and Commonalty, there was an absolute invest-  
 179 ment in that body of the whole estate, in fee, in *the soil*, and the whole control and dominion of the streets. This estate and control vested in the Corporation, so far as concerned all streets opened under the authority or sway of the Dutch, precisely as it had vested in the Dutch government. (a) But suppose there were a plausible objection to the position, that this right passed to the duke, and from him to the Corporation, through Dongan's charter, then the charter of Montgomerie confirmed the grant, (§ 37.) Suppose, again, that this charter, by any possibility, was inoperative, then the fundamental 180 act of October, 1732, removes *every* difficulty. As repeatedly observed in this work, that statute is the irreversible foundation of the rights of the city. It is a charter given by the whole power of the government, equal to an act of Parliament; and recognizes, renews, and more than this, enacts, that the powers enumerated in all the prior charters shall vest in the Corporation; and were it possible that any doubt

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(a) If there were any doubt whether the duke acquired this right under his patent of March, 1664, or a reasonable ground for supposing that he lost it upon the reconquest by the Dutch in 1673, the question would be settled by the operation of the new patent granted to the duke on the 29th June, 1674.—See Smith, vol. i, p. 32 and note.

could still exist on the point, the act of the seventeenth of April, 1793, vesting all the title of the people of the State to lands before left for *streets*, would dispel it. 181

II. The materials connected with the second period, viz. that from 1604 to 1688 and 1691, are less precise than those before. Those collected relate to the streets not appearing to have been opened before 1664, and appearing to have been in use subsequently. In this enquiry, the map of 1695 has been much depended upon, as showing such other streets, and these were almost entirely without the wall.

Memorials and traces of Queene street, (Pine,) Smith street, (Ceder,) Crowne street, Maiden Lane, Nassau street, and 182 Broadway, are stated.

As to the latter, the following are some of the documents referred to :

1. Adjoining the land-gate was a strip of ground known as the Governor's Garden, which was specially excepted out of the grant to the Corporation in the Dongan charter of 1686. It afterwards known as the Queen's Garden, and was granted by Queen Ann to Trinity Church in 1705. It is described as "fronting the Broadway on the east."

2. Next to this piece of ground was a tract of land, known in the charter of Dongan as the new burial place without the 183 gate, and is shown on the map of 1695.

The charter to Trinity Church of 1697, recites a petition of that church for a grant of a piece of ground without the North Gate, in or near to a street called the Broadway—in breadth on the east side as the said street rangeth, northward 310 feet to the land of Thomas Lloyd.

In 1703, the Corporation of New-York granted this strip to 184 Trinity Church by *the* same description. The Corporation got it from Dongan by his charter.

3. The next strip to the northward was the land of Thomas Lloyd. He acquired title from William Dyse, by deed of the 23d of April, 1686. It runs "southerly along the highway, as the fence now stands, to the church-yard or burial-place, 468 feet."

The intermediate ground granted to 'Thomas Day, brings the location up to the southern boundary of the King's Farm. The title to that came to Trinity Church under Queen Ann, 185 in 1705, *and* her patent bounded the tract on Broadway, the Common and the Swamp.

Other documents are collected, showing the source of title to various parcels from Wall street to the Maiden lane, on the east side, with some exceptions.

The treatise then proceeds :

"I have not been able to ascertain with precision under what authority or in what formal manner the new streets during this

period were opened or altered. The power of government resided in the Governor and Council, possibly with the participation of the Court of Assizes, as we find that body aiding in forming and promulgating the amendments *to* the Duke of 186 York's laws. In 1683, the first Assembly was convened.

These conclusions, however, it appears to me may be sustained: 1st, Such streets were laid out over land not before granted, in continuation of former streets the space being occupied and by usage taken for streets; 2d, Or they were laid out by the public authority through granted land; 3d, Or laid out and continued through land still in the royal government; or, 4th, Through land granted by the Dutch to the Corporation of New-York, in 1658, or before, as vacant *and* uncon- 187 ceded land.

If the streets were laid out by express act, or recognition of used paths over unconceded lands, then, grants bounded upon such streets by the English governors did not carry any right to the street, upon the admitted principle of law, that grants by the sovereign power are to be construed against the grantee, in reverse of the general rule. The terms used must carry the possession distinctly into the street.

If such street were opened, through previously conceded lands, then the warrantable presumption is, from all preceding acts, from the provision in the act of October, 1691, *and* other 188 circumstances, that the system of compensation for damages arising from the occupancy of any ground, then prevailed.

If such streets run through land vacant and unconceded in 1658, and then vested in the Corporation of New-York, the right to any part of the street did not remain in the Corporation, and could not and did not pass from them by their subsequent grants, bounded on such streets.

1. For the reason that when the public has taken lands, and made compensation, and a corporate or other body has acquired the legal title, there is *no* remaining interest, by reverter or otherwise, in adjoining owners. This important point is hereafter fully examined, and sought to be established.

2. Because the Corporation of New-York, in applying for and accepting the charter of 1686, and claiming title to the streets by virtue thereof, recognized that such title was in the sovereign power, and not in themselves.

3. Because their grants may reasonably be treated as within the rule before adverted to as to the construction of grants by the public authority ;—and

190 4. Because, as to the streets, their estate, though in *fee*, is subject to a trust ; and a trustee's deed shall not be construed to cover any more than it definitely and expressly conveys.

III. To illustrate the subject during the third period, from 1686 and 1691 to 1806, I have transcribed the clause in the charter of 1686, granting the streets then laid out in *fee* for the use of the inhabitants ; the most important act of October 1st, 1691 ; the five acts of the Legislature in relation to par-

ticular streets; *and* various transactions and ordinances of the 191 Corporation. The series of statutes, colonial or otherwise, as to public highways, and how or where they affected any part of the Island of New-York, are also noticed.

Among the statutes was one in 1784 for appointing Commissioners to re-order the streets upon which houses had stood, destroyed by the fire of 1776. Under this, Greenwich and Washington streets were laid out. An act of 1793 relating to the lower part of John street, Golden Hill street, is also referred to. This *was* rendered necessary because portions of 192 houses were required which the Corporation in the act of 1691 were forbidden to take.

The same statute, 17th March, 1793, contains the important clause by which the right and title of the State to all lands theretofore left for streets in the city of New-York, is vested in the Corporation.

An act of April 3d, 1803, directing that no streets should be laid out in the city without the consent of the Common Council, and that they may shut up such as *are* not opened with 193 their consent, is also noticed.—(3 Webster, 232, § 10.)

Acts of the Corporation under the statute of 1691 are also cited, and the treatise proceeds:

“It merits observation, that this important act of 1st October, 1691, remained the law of the State until 1784. By a statute of April 16, 1784, it was superseded; but the first and

194 second sections of that act are almost precisely the same as the first and second of the act of 1691. In fact *it* governed the colony and the State till the great change in the system, consequent upon the law of April 3, 1807, laying out streets and avenues.

By this law of 1691, the system of compensation for damages through the means of a jury was adopted, and the land condemned was to be taken by the Corporation, and converted to the purposes of public streets.

195 It is a principle of the law, where streets and highways have been long used, and the time and mode of opening them is not settled, that they are to be considered as opened under the public law in force at the earliest *date* up to which they are traced. (a)

The streets of New-York were then opened during the period in question, in one of the following modes:

1. Under the acts of 1691, or 1784, expressly pursuing their provisions.

2. By adoption of streets laid out by owners through their own grounds, and accepting grants and cessions of the same.\*

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(a) 2 John. Rep. 424. 2 Southard, 482. 10 Picker. 449.

\* These are to be found in the office of the Comptroller, and many of them are quoted in the Treatise

3. Under covenants between the Corporation and the grantees of water lots within the four hundred feet under water, granted by Montgomery.
4. Under special acts of the Legislature, in particular cases.
5. And where *it* cannot be shown that a street originated in 196 one or the other of these methods, the implication of law is that it was laid out under the statutes referred to.

It results then, that all the streets, I believe, without exception, opened during this period, through or affecting private grounds, were opened under statutes or cessions which recognized the principle of compensation for any ground taken, or damage sustained.\*

The effect and operation of all, was to vest the fee of the soil in the Corporation ; and the implication is that full remuneration was given when the land was taken, and the notion 197 was an abatement being made upon the ground of a possible reverter to owners, is visionary.

Now, in my humble opinion, it has never yet been decided in our state, that where the fee of a street, taken for public use, upon an award of compensation, actually made, or open to the owners, has been, either by statute or private grant, vested in the Corporation, in terms, or by necessary implication, the original owner has any residue of interest, or any es- 198

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\* Those under the covenants, in the water grants, are of a very special character, and will be separately considered hereafter.

tate or right coming to him upon the closing of such street. I apprehend that the law is otherwise; and aware of the apparent weight of authorities against me, and the great importance of the subject, I shall minutely examine the cases."

I proceed in the treatise with an argument which I need not transcribe, even if it were entitled to any weight.

IV. I need not, I presume, for your present purposes, transcribe any thing relating to the fourth period, viz. since 1807  
 199 and the fundamental act of 1813. It is sufficient to observe here, that I dwell much upon the fact, that the clause vesting the fee of all streets opened under its provisions, in the corporation, was a recognition and continuation of a great principle and rule, which sprung up in the earliest dawn of our municipal government, and has prevailed ever since. And I consequently believe, that the fee in trust, of the whole of every public street on the Island now in use, is vested in the Corporation, or undoubtedly a fee, qualified only by the possibility  
 200 of reverter. That right of property, and that entire *dominion* over the streets carries with it powers and obligations of great moment. It is a trust for the use and benefit of the inhabitants; and here we have one limitation of the authority. But in acting in its legislative capacity, and in executing this trust, it is apparent that it must and does possess great powers. And the subject has of late years received great attention judicially and otherwise in connection with the system of street rail roads."

Your obedient servant,

MURRAY HOFFMAN.

January 11, 1853.

NEW-YORK, January 13th, 1853.

*Gentlemen*—In compliance with your further request, I 201 transmit a copy of the other portion of the work upon the subject.

M. HOFFMAN.

The following considerations appear to me to sustain the right of the Corporation to permit the use of the streets for rail roads. The views in the foregoing Treatise may be first usefully re-stated. The power and interest of the Corporation in the streets must necessarily be of one or other of these classes:—

I.—The legal estate in fee fully vested in that body for the use and service of the inhabitants, with no limitation of the absolute property and dominion *but* what results from that trust. 202

II.—A qualified estate in fee which would be divested upon the street being closed, the land then going to the adjoining owners, but the title being otherwise perfect and absolute, except as affected by the trust before mentioned.

III.—A naked power and right of control over the streets. A power in trust for the use and service of the inhabitants, and consisting with the continuance of the actual fee in the adjoining owners.

1. In considering the question under the first view, it may be useful to re-state *the* conclusions arrived at in the preceding 203 pages, as to the cases in which a fee vests in the Corporation.

It is considered to be a proposition entirely free from doubt, that every street opened in the city under the Dutch Government, and prior to the surrender in 1664, passed in fee to the English Government as a royalty; and passed to the Corporation of New-York, in fee, by the grant in the charter of Dongan, confirmed by that of Montgomery, reconfirmed by the 204 great act of October, 1732; and if anything more *was* needed, finally sanctioned by the Statute of the 17th March, 1793.

2. It is also clear that, as the streets opened between 1664 and 1686, if they ran through land then remaining in the Sovereign Power, the grant in the Charter of that year vested the fee in the Corporation. No grant to individuals bounding on the street made in the interim would prevent this result; because, among other reasons, of the rule which construes the grants of the State strictly against the grantee.

205 3. As to streets run *within* that period through vacant and unpatented land, the whole belonged to the Corporation, under the grant of the Director General and Council of 1658, ratified in the Articles of Capitulation in 1664. In such cases, either the fee continued in the Corporation or passed to the Government, and from the Government to the City, by the Dongan Charter. In either case, no after grant of the Corporation bounded on the street, passed any title therein to the grantee, for the reasons before stated. (a)

206 4. As to streets opened through lands *before* granted to individuals, it was submitted that no case of the kind could be

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(a) They are copied post.

found, unless it were New street, as to which my researches have been fruitless to ascertain when and how it was laid out, except that it was probably not open in 1677, and was in 1683.

The presumption as to this and any other such street is, that it was opened upon a principle of compensation or cession. And the fact is clear that the English Government did assume to own the streets, and did profess to transfer them *in fee* to the Corporation. With such a ground of claim and occupancy, and use of such streets for more than one hundred and sixty years, it is reasonable to conclude that the fee is in the Corporation, at least till the contrary is plainly made out.

5. Then as to the important period between 1691 and 1807, or the statute of 1813, the results arrived at were as follows :

Other streets were acquired and opened for public use in one of these modes—1. Under the statute of 1691. As to this, 208 it was observed, that the restrictions in that act forbidding houses, or any inclosed or fenced land to be taken, would prevent the statute being often resorted to, and that when resorted to, by its fair construction or title in fee passed under it, to land condemned and paid for after verdict or judgment, or undoubtedly, a qualified fee passed, admitting a right of reverter. 2. Such streets were laid out in some few cases under particular acts of the Legislature; such as that of 1784, under which Greenwich and Washington streets were opened; that of 1793, enlarging Golden Hill street; the act of April 6th, 209 1792, as to Roosevelt and Frankfort streets, and the act of April 6th, 1795, as to Bancher street and Beaver Lane. In

considering these statutes, it has been supposed that the actual fee did pass under them, or indisputably a fee only qualified by being defeasable upon closure. 3. Again, streets were opened during this period by acts of the Corporation over its own land, such as all the streets from high water, 210 within the line of the 400 *feet* grant. First street was so laid out in 1739, and Second and Third streets on the North River; Water, Front, and South street, in part, on the East River. As to these, the proposition is supposed to be clear, that no right to the street passed by any subsequent grant, to individuals. (a) A grave question might arise in the few cases of a grant of the whole strip, and a covenant to make a street in a part of it. 4. Again, some streets were run through ground of the Corporation, held by it under the successive 211 grants of 1658, 1686 and 1730, of all vacant, unpatented and unappropriated land in the city. And it is supposed that a large part of the streets opened within the period spoken of, were so laid out.

In this case, it was argued that the grantees of the Corporation bounded on a street, even if the words employed would in other cases have carried the grantee to the centre of the street, (b) cannot so operate. The reasons, as before stated, 212 are these: That it may be reasonably contended that such a grant is within the rule applicable to grants by the State, and nothing shall pass by intendment unless it be absolutely inevitable. *But, next*—The Corporation held the title to the

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(a) See part next subdivision.

(b) See the cases of Herring, and others, in the Superior Court—2 Sanf. S. C. Rep.

streets as Trustees. They were for the public use. A deed by a Trustee of what he holds as private property, can by no means pass what he holds as Trustee. It is true, there is one sense in which the Corporation holds all its land as Trustees, that is, the use and proceeds are for the public; but the trust is not definite, as in the present *case*. The power of 213 alienation in one instance is unrestricted; in the other, the use of the street for the special purposes cannot be changed, and the right of aliening cannot be acquired under the paramount authority. In other words, the grant of the street in express terms, would probably be void; much less can intentment be permitted to pass it.

Another and very extensive class of streets found within this period, were those opened by private proprietors through their own grounds. A number of these were ceded to the Corporation; and some were in whole or part adopted and *opened* under the provisions of the statute of 1813. 214

Thus in May, 1733, Courtlandt street was ceded to be and remain a public street or highway, in like manner as the other streets of the city now are or lawfully ought to be.

In 1749, Thames-street; in September, 1761, a number of streets were ceded by Trinity Church.

In 1763, several to the northward of Fresh Water. And in 1797, the cession was made of Hudson and other streets.

Now, in these *and* numerous other instances, the cessions 215 are, I believe, invariably made in terms which convey a fee,

but in very many, upon such provisions as the following: "to have and to hold, &c. for public uses for ever, in the same manner as the other streets of the said city are used, to be kept open for the use of the citizens for ever."

It cannot be questioned, that this provision was necessarily subservient to the right of the legislative power at any rate, if not of the Corporation, to discontinue the use of the street 216 when public good required. But the fee was *in terms* conveyed.

Lastly. As to all streets opened after the act of 1807, and under the laws adopted to carry out that system, the statute (when the report is confirmed) vests the fee in the Corporation of the land taken. In trust, nevertheless, that the same be appropriated and kept open for a public street, &c. in like manner, as the public streets are and of right ought to be.

I conclude that these propositions are made out. That as to a large number of the streets of the city, it is plainly 217 proved that the absolute unconditional *fee* is vested in the Corporation. That as to another large number, it is certain, that if an absolute fee does not vest, a limited or qualified one does so, restricted only by the possibility of a reverter upon a discontinuance. And that, so strong and prevailing is the historical and other evidence upon this point, that the assumption is warrantable, that the tenure of every street in the city is the same, viz. an absolute or qualified fee; and that the contrary must be specially shown in any given case.

In the view then either of an absolute *or* limited fee in trust, what rules are applicable to the case? 218

Either that the contemplated act of the trustee is prohibited by the letter, or just construction of the instrument creating the trust; or that the public use and benefit, instead of being served, will be essentially injured by the act.

It is impossible to say, that upon any construction of the instrument, out of which this trust arises, there is any prohibition even implied against laying a rail road through a street. Whether that is or is not beneficial, is a question of fact, which nothing in the *documents* tends to solve. 218

Then, is the trust violated by this particular employment of the streets? What degree of injury is necessary to justify such a conclusion? What extent of detriment to some or many would be insufficient?

Probably this question depends so much upon the circumstances of each case, that only some general and fixed rules can be brought to bear upon it. I apprehend, that it does not depend upon a question of detriment to some or to many; but whether the mass of inhabitants and travellers are more benefited than injured? And I conceive that *the only safe rule* 219 upon the subject, is to apply the doctrine and cases respecting nuisances to it.

On this head, the cases referred to in another part of this treatise, upon the subject of purprestures and abating nui-

sances in navigable streams, are very important. (See appendix, No. 54.)

See Hale *De Portibus*; Attorney General vs. Johnstone, 2 Wilson; Exch. Rep. 95; 2 Starkie N. P. 510; Rex. vs. Russell, 6 Bar. and Cress, 56; the King vs. Ward, and Adol. & 220 Ellis, 392; Atty. Gen. vs. Richards, 2 Anstr. 605; 18 Vesey, 218. See also Atty. Gen. vs. E. Counties, &c. R. R. cases, 823; the Queen vs. Scott, 3 R. R. cases, 190.

III.—But the question is lastly to be considered upon the supposition that they possess only a power in trust over the streets. That power subsists at the present day as it was conferred in the charter of Dongan. It could only be taken away, if at all, by Legislative authority; and it has, on the other hand, received continued Legislative sanction. It is 221 this—"The Mayor, Aldermen *and* Commonalty, and their successors for ever, shall have full power, license, and authority to establish, appoint, order, and direct the establishing, making, laying out, ordering, amending, and repairing of all streets, lanes, alleys, highways, &c. in the city of New-York and Manhattan Island, necessary, useful, and convenient for the inhabitants, and all passengers and travellers there."

In conjunction with this, let another principle be considered. In every imaginable case of the use of a highway or street for public purposes, in whatever mode the land is so appropriated, 222 some estate, or right, or title vests in the *public* power. If the Corporation of New-York acquired this title or interest in no other manner, it did so under the Act of April 17th, 1793.

If, then, we regard the right which did pass to the public power, in its lowest form, as a mere easement, yet that easement was a power, or involved a power, of managing and using the street, so as to subserve the purposes of convenient and safe travelling.

I consider, then, that a power to license the use of the streets by public carts, by hackney coaches, and by rail road *cars*, is an incident to the power of ordering and controlling 223 the streets. It is within the principle of an inferential power, reasonably or necessarily resulting from an authority granted.

The power granted is to order and regulate or preserve the streets, with the entire right of possession, if nothing more. I cannot conceive of anything more plainly involved in that power and possession than the directing the vehicles to be used, and the mode of travelling, in the manner they may deem expedient.

MURRAY HOFFMAN.

## SUPERIOR COURT.

224      Thomas E. Davis and another,      }  
                     *against*      }  
     The Mayor, Aldermen and Commonalty      }  
          of the City of New-York.      }

*State of New-York, County of New-York, ss.:*

MURRAY HOFFMAN, of the City of New-York, being sworn, saith, that for a period of more than two years past, he has been engaged for a considerable portion of the time in examining into the rights and interests of the Corporation of New-York, in real estate and property generally, and as to their estate and power in relation to the streets of the city. That the materials collected by him have been stated, and 225 his conclusions upon the same, set forth in a treatise *lately* prepared by him, and transferred to the Corporation; and that the foregoing is a correct abstract, and in part a transcript from such treatise. And further, that, according to his best information and belief, the facts therein stated are true.

MURRAY HOFFMAN.

Sworn before me, the 11th January, 1853,

A. G. HARWOOD,

*Commissioner of Deeds.*

## SUPERIOR COURT.

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Thomas E. Davis and Courtlandt Palmer, }  
 against  
 The Mayor, Aldermen and Commonalty of }  
 the City of New-York. }

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*City and County of New-York.*

JOHN ANDERSON, being sworn, saith, that he was one of the original applicants for the Broadway Railway, and is one of 226 the present associates.

In the Board of Aldermen, the matter was referred to a Special Committee; before whom a public discussion took place, which lasted nearly a month; and, in the course of the discussion, the following opinions of the counsel to the Corporation, of the President of the Croton Aqueduct Department, of the late Street Commissioner, and of a former Comptroller of the city, were produced before the committee, on the part of the remonstrants against the grant.

JOHN ANDERSON.

Sworn before me, this 14th day of  
 January, 1853,

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W. H. SPARKS,  
*Commissioner of Deeds.*

*OPINION of Henry E. Davies, Esq. Counsel to the Corporation, and others, in reference to the powers of the Corporation, in establishing City Rail Roads.*

NEW-YORK, March 3d, 1851.

Assistant Alderman THOS. J. BARR:

Dear Sir,—In answer to the questions submitted to me in your note of the 27th ult. I have the honor to state:

That the first question propounded has been, in my judgment, most fully and satisfactorily answered affirmatively, in the decision of the Supreme Court of this district, in the case 228 of Drake and others, v. The Hudson River Rail Road Company. (See Doc. No. 10 of Board of Aldermen, January 28, 1850.) In that case, the question was fully discussed by eminent counsel, and thoroughly examined by the court, whose decision was accompanied by a learned and elaborate opinion.

The reasons of the Court upon this point are deemed to be perfectly conclusive, and the question may be considered as set at rest.

The Court say, (see p. 218 of said document,) "rail roads are of recent introduction, but their great and acknowledged advantages over all other modes of travel and land carriage, have gained for them a popularity which has brought them into extensive use, and is constantly yet further extending their adop-

tion. The actual existence of them in other cities, and the example of the Harlem rail road in our own city, which has been in successful operation for several years under our own eyes, conclusively show that the use of them in the streets of a city, if properly guarded and regulated, is *perfectly compatible with the trusts of public streets*, and the simultaneous use of those streets by other carriages and vehicles, and for all the 230 purposes to which public streets are dedicated."

In reference to the second question, I do not find that any authority has been vested in the Corporation to establish and maintain rail roads; and the decision of the Court of Appeals in the case of Halstead vs. The Mayor, &c. of New-York, (3 Comstock's Reports, page 430,) settles the question, that municipal corporations can exercise no power or contract any obligations not authorized by law.

To satisfactorily answer your third question, it will be necessary to briefly inquire into the nature and extent of the property in the public streets vested in the Corporation of this city, under its general powers, and how far it is consistent with such power to exact a *bonus* or *general compensation* for the grant of the privilege to use such streets in a particular manner, and if upon such examination the authority is not found to justify such exaction, whether under the special statutes of the Legislature relating to the use of the streets by public vehicles, rail cars may be classed so as to be subject to their provisions.

It should be observed at the outset, *that* where it was at- 232 tempted or designed in any of the charters of the city to grant

any right or privilege for the private benefit or emolument of the Corporation of the city, the language employed for that purpose has been as clear, explicit, and unmistakable in its character, as that adopted in the usual conveyances of real estate from one individual to another.

By the Charter of 1730, "the rents, issues, profits, fees and other advantages arising and accruing from the ferries then established, and to be thereafter established around New-York 233 island, *were* granted to the Mayor, Aldermen and Commonalty of the City of New-York, and their successors for ever, to have, take, hold, and enjoy the same to their own use, without being accountable for the same, or any part thereof." By similar grant, the Corporation hold the public markets, the wharves, piers, and slips of the city, and other important rights and privileges affecting the public interests; and they are vested in the city as free from legislative or other interference, as the fee of land in a private owner, as was fully es- 234 tablished in the recent attempt on *the* part of the Legislature to wrest from the city its vested rights in relation to the ferries in the East River.

Now, the language used in the Charter in relation to the public streets is of a very different character; it is, that "the Common Council shall have the power to establish, direct, lay out, alter, repair and amend streets, lanes, alleys, highways, water-courses and bridges, throughout the city and island of Manhattan, in such a manner as the said Common Council for the time being, or a major part of them, shall think or judge 235 to be *necessary and convenient for all the inhabitants and travellers there.*"

Without occupying any space with reasoning to show that this grant to establish, &c. the public streets, for the convenience and necessities of the inhabitants and travellers of the city, conferred upon the Corporation no private property, or right to derive revenue therefrom, it will be sufficient to quote the language of Chancellor Kent upon this subject. In his treatise upon the powers of the Corporation, he says, "This is a grant of a public nature, without any *private interest, or property, or revenue*, connected with it." (City Charter and Kent's *notes*, new ed. page 236.)

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The act of 1813, reducing the several laws relating particularly to the City of New-York into one act, provides that the land taken for the opening of streets, avenues, and squares, laid out by the Commissioners for laying out the city into streets and avenues, and all the lands required and taken for forming and opening streets, avenues, squares, and places in the parts of the city laid out by the said Commissioners into streets, avenues, and squares, should when taken for any parts of the said purposes, be vested in "the Mayor, Aldermen and 237 Commonalty of the said city, who should become seized of the same in fee, in *trust for the uses and purposes of public streets, avenues, and squares.*" (Sec. 278, of the act of April 9, 1813, relating to the City of New-York.)

Thus it will be seen from these two authorities, and they constitute the source from which all the general powers of the Corporation in relation to the streets of the city flow, that the grant is for the benefit and advantage of the public; and that the Corporation are mere trustees for the purpose of 238 securing the free use and enjoyment thereof for the purposes

of public travel. (See Drake and others vs. The Hudson River Rail Road Co. before cited.)

Adopting the views and construction of Chancellor Kent, it therefore appears, that the Corporation cannot by virtue of its original grant by charter, use the streets for its private interests, or as its property, or as a source of revenue, and the act of 1813, pursuing the same policy, and vesting the fee of the 239 lands in the public streets in the Corporation, *only* in trust for the uses and purposes of public streets, that no private ownership has been vested in the Corporation, and that no revenue or profit can be derived under its provisions.

By the 272d section of the Act of 1813, and the Act of February 21st, 1824, chap. 50, the Mayor of the city is authorized to license the owners of hackney coaches and carriages for hire, under the direction of the Common Council, 240 and who are to pay an annual sum for the same. Here it *may* be observed, that the action of the Legislature giving the Common Council power to license public vehicles, is an important legislative exposition of the powers of the Corporation in respect to the streets. If the Common Council possessed the right to do as they pleased in regard to the streets, and to demand a bonus or compensation for privileges connected therewith, would it not have been altogether idle and unnecessary to invest them, by a special act of the Legislature, with power to exact charges for license?

The obvious and necessary inference of this legislative action is, *that* power was wanting; and if these acts are stricken from the Statute book, the Corporation could not tax any coach or carriage for the use of the public streets.

It might also be observed in this connection that the charges for license, permitted by the acts cited, do not appear to be granted as sources of revenue, but simply as a remuneration for the damage or injury, occasioned by the special use of the streets by public vehicles. No charge is authorized in reference to private carriages, but the power is limited to those vehicles, that are constantly being *driven* upon and over the 242 pavements. The charge is analogous to that demanded and received by the Corporation, for permits to build vaults under the streets. It was found, that when the pavement was taken up for such purpose, it was so unskilfully and carelessly replaced, as to require an expenditure on the part of the city to put it in its former condition ; and to indemnify the city against such expense, the owner is required in all cases, on obtaining a permit to build a vault, to pay a stipulated sum to the street commissioner, as indemnity for the expenses *found* to be con- 243 sequent upon the exercise of the privilege granted.

The section of the act of 1813, and the provisions of the act of 1824, referred to, contain all the authority enlarging the powers of the Corporation in respect to the use of the streets, and the compensation which may be required, that I am able to find.

It will be necessary, therefore, that rail cars should come within the intent and meaning of these acts to justify *any charge*, for the privilege of running them upon and through the public streets.

The laws last *cited* were passed before omnibuses were in- 244 introduced ; and when these new vehicles were brought into use,

the question arose, as to whether the provisions of such acts were applicable to them.

Chancellor Kent, in considering this question, (City Charter, and Kent's Notes, new ed. page 288,) held, that they were undoubtedly carriages for hire, within the meaning of the law, and were subject to the charges authorized to be imposed upon each public carriage, by way of license. Now, are not rail cars equally "carriages for hire," with omnibuses? I apprehend they are. Of course, neither the construction, mode of propulsion, nor name of the vehicle, can make any difference in reference to the principle—they both traverse the public streets, for the use of the public; and those who travel in them, are required to pay for the privilege. But this question seems to be fully settled by the Supreme Court, in the case of Drake and others, before cited. (See page 206, Doc. No. 10, of Board of Aldermen, 1850.) The Court say, "a leading use and purpose of a public street is, for travellers and others to pass and re-pass on *and* over the same, with horses, carriages and other vehicles, and on foot. All parties must concur in that definition, as applicable to the right of way over the public streets of the city. *And does not the rail road, with its cars propelled by the application of steam, or by animal power, come equally within the definition as the cart, carriage, or omnibus, drawn by animals?* And the Court hold, that there is no difference in principle between rail cars and other public carriages traversing our streets."

I have thus, I believe, answered all the questions propounded by you; I have bestowed upon their consideration such investigation and examination as their importance de-

manded at my hands; and in the results at which I have arrived, have simply followed the conclusions of express adjudications of our Courts, and the views of Chancellor Kent, in defining the powers of the Corporation of this city.

To recapitulate—my answers are:

“FIRST.—That the Corporation possess full power to grant the privilege of establishing rail roads through the streets and avenues of the city.

“SECOND.—That the Corporation cannot legally engage in the enterprise of building and conducting a rail road, without an express grant from *the Legislature* therefor; and that to 248 use the public monies for such purposes, without further Legislative authority, would be in violation of law;—and

“THIRD.—That the Corporation cannot exact any bonus or general compensation, for the grant of the privilege of laying a rail road upon or through the streets of the city, but a charge upon each car, for the license to run, may be imposed, under the provisions of the acts of 1813 and 1824, above cited.”

Yours, &c.,

(Signed,)

HENRY E. DAVIES.

249 *Selections from letters of Nicholas Dean, Esq. President of the Croton Aqueduct Department; John T. Dodge, Esq. Street Commissioner; and John Ewen, Esq. former Street Commissioner, in favor of City rail roads.*

New-York, March 7th, 1850.

Gentlemen :

The pressing details of official duty, leave me little time for reflection upon any subject not connected with those duties, and still less for putting them on paper ; but, having for years past had my attention directed to the subject of rail roads in the streets of the city, I avail myself of the invitation your letter affords, to put the results to which I have arrived before you.

250 The form of our island is such, that the city can grow in but one direction, and as the population is, by its expansion, removed farther from the centre of business, means of transportation to and from that centre, become yearly more and more important, and the inadequacy of the omnibus system to effect the object, is exhibited in a most convincing manner. The great thoroughfares are now crowded with them to a dangerous extent, and yet at morning and evening, especially during storms, it is only those at the two extremes of the 251 line who can hope to get a *place* in one ; leaving the intermediate residents wholly unaccommodated. Nor is it possible, owing to the small number that can be seated in each—only twelve—to put enough of them on the leading streets, especially in Broadway, to do the required service, without

excluding every other vehicle from it. But for the relief given to Broadway, about Union Square, and in that vicinity, by the cars of the Harlem road, the truth of the last proposition would have long since become apparent. Railroad cars can be made to accommodate comfortably from forty to fifty persons—need not occupy for *a* double track, more than 252 twelve feet of the street—and are in all particulars so much more desirable a means of transit than an omnibus, that many of our business men in Wall street, and below it, have for years past walked to and from the cars at the Park, in preference to taking an omnibus, though it passed the doors of their residence and place of business both.

For these and various other reasons, (some of which are hereinafter stated,) I have long believed, and do now believe, that the great interests of the city, and the convenience of its 253 inhabitants, alike require the substitution of said cars for omnibuses in some of our leading avenues. How many of them should be constructed, the mode of construction, and the locality of each, are matters of legislation, calling for careful consideration.

I have strong doubts whether the cars should be permitted to pass *below Chambers street*; it would be no hardship to walk from thence to Wall street; and if it were, its tendency would be beneficial, in gradually drawing business from the extreme point of the island upwards, and near the termini of these rails.

Every step taken for the last quarter of a century by our 254 city government, has, unfortunately, led directly to crowd and

circumscribe business within a very limited and insufficient area, in the First Ward. Millions have been expended in opening streets there, and in extending piers and building bulkheads, to get a depth of water sufficient to accommodate our mercantile marine ; ferries have been increased and are increasing,—while lines of omnibuses have been established to communicate with these ferries,—not to serve the wants of our own citizens, but to furnish the means of ingress, (and 255 what is worse,) of egress to thousands *who* do not hesitate to avail themselves of the great commercial advantages of our city, to acquire fortunes ; but who are very willing to escape the burthen of taxation, imposed to create the very facilities they are enjoying, as well as to maintain our municipal government.

In this way, has Brooklyn, within the period last mentioned, grown from an inconsiderable village, to be the second city of the State ; and in this way it is, that Williamsburgh, and Jersey City, and Hoboken, and Newark, and Staten Island, and many other places hope to grow. The whole are but 256 suburbs of *this* metropolis ; at least one-half of the wealth and population of each, rightfully belong to it ; to whose numerical strength and aggregate capital, both ought in fairness to contribute, and not, as now, like fungi and excrescences, prey upon it.

To arrest this ruinous tendency, prompt and decisive legislation is required of our Common Council ; and in my opinion, no way will be found so ready and effectual, as the construction of rail roads on a few of our leading avenues. These would bring into immediate occupancy, our own vacant lots

upon the Island, by furnishing a more certain and *pleasant* 257 mode of reaching them than has heretofore existed; would add to our taxable capital, and also go far to abate the desire hitherto manifested to find a residence by crossing a ferry.

The advantage of the contemplated lines of rail road, may be summed up as follows:

The same number of vehicles would convey four times as many passengers as omnibuses.

As a mode of conveyance, they are not only pleasanter, but quicker, and therefore more economical.

Confined to a fixed track, they are easily avoided; and therefore less dangerous.

Passing upon an iron rail, the wheels do not affect *the* paving- 258 ment, and the spaces between the rails, on which the horses travel, being kept in order by the parties owning them, the Treasury would be saved an expenditure of many thousands annually, in the item of paving.

The admitted nuisance of increasing the number of omnibuses would be avoided.

Our own Island would be rapidly filled up with dwellings; and wealth and population, not as heretofore abstracted from us, but retained and fixed here.

And lastly, above all and beyond all, the wants of the people and the extent of the city, require these rail roads; and to 259 these, all *minor* considerations should yield.

I regret that my leisure has permitted me to say so little upon a subject involving so many and such important considerations. If, however, it should be the means of inducing thought and inquiry on the part of others having more time, and greater ability to devote to it, this letter would have produced good results.

Respectfully, gentlemen,

Your friend and servant,

NICHOLAS DEAN.

MESSRS. SHERMAN & PETTIGREW.

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NEW-YORK, March 27th, 1850.

MESSRS. SHERMAN & PETTIGREW:

Gentlemen,—I am in the receipt of your note, calling my 260 attention to your plan of a rail track for Broadway, and asking my opinion of it, in view of the obstructing or facilitating the general use of the street for travel. This, I believe, is the substance of your queries.

From an examination of your plan for the rail, I think no objection can be made to it, on the score of interference with the general travel. The groove being but three-quarters of an inch in width at the surface, and diminishing from that, would permit of vehicles running upon it, or crossing the track at 261 any angle, without any injury. An important point to be

considered, under the head of obstructions, is, whether carts engaged in depositing or removing merchandise from the business portions of the street, can do so without being hindered by the passage of cars.

The carriage-way of Broadway, from curb to curb, is about forty feet in width; and your double track with the cars upon it will occupy, during their passage, thirteen feet, as laid down upon your plan; this will leave between the curb-stones and cars a distance of thirteen and a half feet; a cart backed against the curb-stone will require about thirteen *feet*, leaving 262 ample room for the passing of your cars without interference with persons engaged in the delivery of merchandise. With regard to the general travel, while the rail track may be rode upon or crossed in any direction, without injury to private vehicles, I am of opinion that the effect of the track will be to throw open the travel uniformly to the right and left; thus rather promoting than interfering with the facilities of movement; the serious stoppages and delays now encountered in passing through the lower part of Broadway, would thus be avoided. I am of opinion that the sidewalks of Broadway, below the Park, and in the exclusively business portions of the street, are unusually wide, and might be reduced at least five feet upon each side, with advantage to the public interests; and the space thus gained thrown into the carriage-way, where it would be of more service. 263

Accompanied with the Russ pavement, which you propose to lay in conjunction with your track, your plan presents strong inducements for its adoption.

Yours, &c.

JOHN T. DODGE.

NEW-YORK, March 27th, 1850.

Messrs. SHERMAN &amp; PETTIGREW:

264 Gentlemen,—I *am* in the receipt of your communication of the 18th instant, requesting my opinion on several points, in regard to laying down a rail road track in Broadway, and its effect upon the interests of the street.

My views have ever been favorable to extending rail road tracks through the streets of our city, and where requisite for the conveyance of passengers and freight; believing the same to be conducive to the interests of the city, and the streets through which they should be laid. But, from the extensive travel in Broadway, I have regarded that street as an exception, and *have* been of opinion that it was not desirable or proper to lay a track through it; but that it should be left entirely free, for the accommodation of the various classes of carriages which now frequent it. My objection is not to cars passing through the street, but to the impediments necessarily presented by a rail road track to the wheels of carriages, when crossing obliquely, in a street so constantly thronged with numerous vehicles, passing at various rates of speed, and requiring to frequently turn out, to avoid collision.

266 If the inconvenience referred to, can be entirely obviated by an improved method of track, then, so far from being objectionable, the track would, in my opinion, be highly desirable; not only in affording better accommodation to passengers than

is now received from the omnibuses, but, by supplying their places, make more room and greater safety for other vehicles.

The plan of track which you have submitted, and which is proposed to be laid down, consisting of an iron plate, with a groove three-quarters of an inch wide in the centre, for the admission of the flange, to be set into Russ pavement, even with its *surface*, would, in my judgment, prove no obstacle to 267 the free passage of vehicles in any direction.

In regard to the practicability of this plan, I am not so entirely satisfied. The general space allowed for the flange appears to me to be rather narrow, and might subject the action of the car wheels to much friction. This effect, however, would, no doubt, be greatly reduced by the employment of light cars, as proposed, carrying but about twenty-four passengers, and passing at moderate speed. The plan might be easily and satisfactorily tested by *laying* it down in a single 268 block.

I am of opinion, that if the plan of track proposed be entirely practicable, its presence would prove a great benefit to the street, as well as to the community at large.

Respectfully,

Your obedient servant,

JOHN EWEN.

## DOCUMENT, No. 57.

## BOARD OF ALDERMEN,

NOVEMBER 19, 1852.

The following Majority Report and resolution on the Broadway rail road, was, as thus amended, adopted ; and two thousand copies directed to be printed, together with the Minority report on the same subject.

D. T. VALENTINE, *Clerk.*

269 The Special Committee, to whom was referred the petitions of Jacob Sharp, William Menzies, John Anderson, Freeman Campbell, D. R. Martin, and others, for the privilege of laying down and working a rail road in Broad way, and also numerous petitions and remonstrances in favor of and against the said project, respectfully

## REPORT:

That your Committee has purposely delayed making any report on the very important matter submitted to it, until time had been given for the full and free discussion of the 270 question by all parties who *chose* to enter upon it. The de-

bate, through the press, has been mainly conducted by two able advocates of its opposite sides, which has been closely watched and followed by your Committee, in common with many of their fellow-citizens interested in the question, with a view to ascertain the merits and demerits of the project referred to. They have also held ten public sittings, devoted to the purpose of affording to all parties, either in person or by counsel, the amplest opportunity of being heard on the subject, *to the end that all the arguments that such an agitation would 271 be likely to elicit, on both sides, might be considered; of these* sittings, one and a half were occupied by the supporters of the application—the rest of the time was used by its opponents.

All presenting themselves, were fully heard.

The result, upon the minds of the Committee, has been a decided conviction in favor of the projected improvement in the system of passenger travel on our great central thoroughfare.

They are satisfied that a rail road is indispensable, *alike* for 272 the relief of Broadway; for the conveyance of the vast and fast increasing passenger travel, and for the accommodation of the other classes of vehicles, which resort, or which want to resort, to that noble street,—justly the pride and delight of our city.

Indeed, it may fairly be said, that before this protracted discussion reached its close, all the principal parties to it, which have appeared before the Committee, the representatives of the omnibus interest, as well as those of the Broadway property interest, have at last met on the same ground with the

273 applicants, in bearing a substantial testimony in favor of a railway in Broadway, by themselves becoming applicants for that which they, at the outset, so vehemently resisted. It is true, that in the case of those appearing as representatives of property owners, these offers were still accompanied with expressions insisting upon the opinion, that the rail road was going to be very prejudicial to the value of property on Broadway; and the privilege of being the parties to lay it, was asked as a means of obtaining indemnification through the profits which they calculated to realize from the rail road. But such

274 *lingering*, nominal adhesion, to an opinion and committal so strongly put forth at the outset, as to make it not easy to abandon them afterward, does not seem entitled to much weight against the practical proof of real change of mind on the merits of the project in itself, which is clearly afforded by such offers to undertake it themselves—presuming, as the Committee, of course, feel bound here to do, those offers to have been sincere, and not a mere indirect mode of killing the project with hostile kindness. Such remuneration, and in

275 deed any degree of safety in an undertaking requiring so large an outlay of capital, could only arise from a successful working of the road; from its yielding satisfaction to the public, so as to be safe against its being, at a later day, abated as a nuisance, or removed by order of the Common Council; and from its commodious conveyance of a larger amount of travel than is moved on Broadway in the present mode. If these effects should result from the change, there could be no injury to the business and property on Broadway; on the contrary, improvement must be its effect. The offer to build the *proposed* road, plainly therefore refutes the chief objection advanced by the *same* parties against the project.

This virtual concurrence finally reached by all the parties to a protracted controversy of this description, so far as regards the basis or subject-matter of the controversy, would seem to yield sufficient testimony in favor of the project of a Broadway rail road in itself, to spare the Committee any need of reporting the reasons which have produced that same result on their minds, which those reasons would seem to have produced on the minds of those who were its very opponents at the *outset* of the discussion. Such concurrence necessarily goes 277 far to cancel the weight and influence of all the anterior opposition to the rail road improvement, both from the same parties, from those represented by them, and those whose signatures to remonstrances may have been procured by them, in support of their own former prejudices and objections. Indeed, it may be said to convert all such virtually abandoned opposition into so much the stronger testimony to the convenience and conclusive merits of the opposite side of the question. Still, the Committee believe that it will be most satisfactory to the Board and the public *for* them to mention some of the 278 reasons in favor of the project, and answers by which the objections heretofore made against it have been met and removed.

The late experience of the City Avenue Rail roads has established one important point in the question, namely: that a very large number of passengers may be conveyed in a single car, without producing the effect of so retarding the movement, from the frequency of the way stoppages, as to create inconvenient delay, in getting from one end of the route to the other. On the Eighth avenue route, from Chambers street, to Fifty-second street, a distance of four miles, the regular time 279

allowed for, and well kept by the cars, is thirty-five minutes; on Sundays, when the number of passengers conveyed one way rises sometimes over a hundred, the time made rises to about forty minutes.

The New-York Express, of the 5th instant, bears the following testimony on this subject :

“*Eighth Avenue Rail Road.*—The success which has attended this enterprise, has been almost without a parallel. The cars are crowded every day, and all day; and run with such punctuality and speed as enhances their convenience much, 280 and makes them *really* a public accomodation. They make the trip from Fifty-first street to Chambers street in thirty minutes; less, in most cases, than half the time the omnibuses take to go over the same ground.

This is much better than that of any omnibus route. In winter, too, we know that very great numbers are moved on mammoth sleighs, with a progress, (in spite of the frequency of stoppages to take up or discharge passengers,) certainly not inferior to omnibus rates of travel. One of these sleighs is stated to have, on one occasion, carried two hundred and 281 eighty passengers. This difference proceeds from the double cause; first, the loss of time occasioned in omnibuses by payment of fare to the driver on getting out; secondly, the advantage afforded by the cars, in enabling most persons, all but the aged, the invalid, or females, to get on or off without the necessity of entirely stopping the headway; this being always a matter of choice to the passenger, who can have the car stopped entirely if he pleases, but who very commonly prefers not to do so.

It is well known that a pair of horses can move a greatly multiplied number of passengers on iron rails, in comparison 282 with what they can do on even the smoothest pavement. Scientific authorities state the proportions at eight to one. Five to one, is the proportion approximately stated, in reference to the Russ pavement, by a highly respectable authority, extensively experienced in city engineering, as founded on observation of rail and pavement traction; and this opinion must fairly commend itself to the common understanding of all who would compare the number of passengers conveyed in omnibuses, (whether in our city or in the European capitals, whose principal streets are, for the most part, paved throughout with *smooth* granite blocks,) with the numbers which are 283 moved with ease on the city rail roads.

These two considerations, namely the feasibility of moving at least five or six times as many passengers with the single pair of horses, and the feasibility of doing so in a single vehicle with dispatch, at least equal to, and indeed better than that practised by omnibuses, point directly to a rail road, as the proper remedy for that obstructed condition of Broadway, which has now reached an excess recognized by all as a state of things imperatively demanding relief and reform. In number, the omnibuses *on* Broadway have been ascertained by 284 observation, (attested by respectable affidavits,) to constitute two-fifths of all the vehicles, (handcarts inclusive,) moving on the street. Their great size and weight must therefore certainly make chargeable to them full three-fifths of the occupation of the carriage-way. The average number per hour passing the Museum, has been duly proved to the Committee, to be about four hundred and eighty, or four hundred and

ninety, of these very large, wide, and heavy vehicles. The passenger travel being now so great, and increasing so fast, 285 while the width of the *street* is fixed, the inference is obvious and inevitable, that if, in lieu of these merely twelve passenger vehicles, we should adopt *sixty*-passenger vehicles, that is to say, rail-cars, (the latter no wider than the former,) a vast relief must be at once afforded ; then *one-fifth* the number of vehicles on Broadway become adequate to move the same amount of passenger travel, and the relief to the over-loaded carriage-way is both manifest and immense.

Broadway is now too narrow to bear any longer the omnibus mode of moving its passenger travel. The growth of 286 the *city*, of the population, and of the travel, has manifestly brought with it the necessity of a more economical application of the available room and power ; and if five or six times the number of passengers now carried can be moved by the same pair of horses, and in a vehicle of no greater width, it is a plain matter of the simplest common sense, if not of absolute necessity, to welcome gladly the mechanical improvement which makes it practicable.

This large disproportion in the capacity of omnibuses and 287 rail-cars, in reference to the number of passengers each *can* convey, points also, plainly, to the ability of the latter to move a *much larger number*, that is to say, to yield a much larger amount of accommodation to the public than can be done by the former ; while at the same time, very great relief could still be obtained in reference to the number of vehicles employed. Overcrowded with omnibuses, as Broadway is, the means of conveyance are still quite insufficient, at

the hours of the heavy travel, as well as in stormy weather; at which periods it is only at the early part, or else at the latter part, of the omnibus routes, that seats can be had in 288 those vehicles at all. There exists, therefore, urgent need, 1st. Of *relief to the carriage-way*, by reducing the number of passenger-vehicles; and 2d, of *increased accommodation to the travel*, by furnishing the means of moving a larger number of passengers in the said reduced number of vehicles. This conclusion seems to be beyond all possible question; and it is but another mode of saying that Broadway *must* be relieved, and the travel *must* be accommodated, with a rail road system substituted for the omnibus system.

An objection would *here* naturally suggest itself to many 289 minds, at a first glance at the subject, which did at first present itself to those of the Committee, with great apparent force; and which, at the earlier stages of the discussion, was strongly urged, though it seems to have been tacitly abandoned at its later stages, namely, a doubt whether the passenger travel on Broadway could be conveyed on a single line of movement, each way, (as on a double rail road track,) without requiring so many vehicles, following one after the other, as to make a continuous wall of them, difficult and 290 hazardous to cross. An examination into the facts of the travel on Broadway, will remove every such apprehension or doubt. The facts on this subject have been laid before the Committee, with such evidence in support of the observations made, and such proof derived from internal evidence, and from the correspondence of the numbers stated with the known numbers of omnibuses, that we feel entitled to refer to them with confidence.

Canal street is a point which may fairly be taken, as the one at which the number of passengers of the Broadway travel, 291 either way, is at its maximum, *at the* respective hours of the heavy movement, up or down. At that point, the omnibuses, at those respective periods, have not yet begun to discharge more passengers than they pick up, so that they are about at their fullest there ; an opinion, which common sense observation would of itself arrive at, and to which the numerical observations made, and well attested, have been found to correspond. About two thousand passengers, at the heaviest hour of the travel, is found to be the number passing that point, in one direction ; or to be more precise, one thousand nine 292 hundred and *fourteen down*, at the heaviest morning hour and two thousand and fifty *up*, at the heaviest evening hour. At the same hours, respectively, the travel in the opposite direction is very small, being in the former case, four hundred and eighteen *up*, and in the latter case, six hundred and sixty-five *down*. Assuming sixty-passenger cars, the number of cars sufficient for these number of passengers, in order to be equal to the omnibus service, would be as follows : For the heaviest morning hour, thirty-two down, and seven *up* ; total, 293 thirty-nine ; and for the heaviest evening hour, thirty-four *up*, and eleven down ; total, forty-five. Sixty cars may be placed on a track per hour, at the rate of movement found satisfactory on the existing city avenue roads, say ten minutes to the mile, and each car will have a space of a tenth of a mile of its track, free from the pressure of either its successor or its predecessor. Even double that degree of proximity could probably be allowed, with care and good management, and with a certain method in the stoppages, (as for instance, at a fixed 294 point in each block,) so as to admit even double *that* number

of cars, for the single hour or two to which the heavy travel is limited ; but if it is taken at only sixty cars per hour, with a tenth of a mile space on the track to each, (the cars being constructed to seat sixty passengers,) then, instead of the present number, of about two thousand at the heaviest hour, the number moved would be about thirty-six hundred. And indeed, with the usual accommodation of willing standing passengers on the *platforms*, (without being allowed still to annoy the seated passengers,) the number which could thus be *moved* 295 per hour, either way, would not be less than forty-five hundred. It is thus plain, that *more than double* the present omnibus accommodation to the passenger travel, could readily be afforded by properly constructed cars, without giving them a greater frequency of succession on the single track, either way, than what would allow to each car a clear space of a tenth of a mile, of which its own length, horses and all, would occupy about thirty-seven or thirty-eight feet. If the travel should ever come to need it, even twice that number, or more than quadruple *the* present travel, up and down Broadway, 296 could be thus accommodated, without multiplying the cars to an impracticable frequency of succession. But before that time, other routes will probably be opened.

A provision should be made for keeping a certain proportion of the cars on such a road at some depot at or near the lower end of the route. In this mode, not only would there be provision for increase of accommodation, in case of storms arising in the course of the day, but also the present necessity would be saved, requiring the prompt return of the whole force of vehicles which brings down the heavy morning travel, even 297 though there is then but little return travel to justify crowding

the streets with so large a proportion of empty vehicles. Not more than half the number of cars would thus move in one direction, while the full force required for the heavy bulk of the travel would be going in the other direction; so that the number of cars devoted to the latter purpose could be increased more and more, according to the public demand for accommodation, at the same time that the total number in motion 298 would be *kept* down with moderate limits. As has been already shown, ninety vehicles per hour, for the heaviest hour of the travel—sixty one way, and thirty the other—would accommodate *more than double the number of passengers now conveyed*; while, on the one track, each vehicle would have a space to itself of one-tenth of a mile, and on the other track one-fifth of a mile.

The difficulty imagined by some, in regard to the too closely continuous succession of cars, thus disappears entirely 299 on an examination of the facts of the case. It is clear that, so far as regards these vehicles, viewed in comparison with the omnibuses proposed to be superseded by them, the street would be cleared and relieved to a degree of which it is difficult to realize a full conception; and this, at the same time, with a vast increase, more than doubling the amount of accommodations afforded to the public.

These essential points are, therefore, in the judgment of the Committee, conclusively established, viz :

That a rail road will move a much larger number of passengers, and with a much smaller number of vehicles;—these 300 being precisely the two imperative wants and demands of the

public, both in reference to the accommodation of the travel and to the relief of the streets.

And that it will affect these now indispensable improvements, *without* falling into the evil of too close a continuity of cars succeeding each other on the track.

The following advantages incident to the proposed change of system for the passenger travel of Broadway, are such as to suggest themselves obviously to the attention of every one who approaches the consideration of the subject; and the Committee do not feel called upon to prove or to dwell upon them.

Cars are *far* superior in the ease and comfort of the motion. They will permit reading or conversation. A seat in a car, (assuming them to be properly constructed, so as to secure proper accommodation to the seated passengers, and at the moderate speed of city travel,) is *repose* as well as convenience; while, in an omnibus, it is *fatigue* in itself, which, on a long route, is annoying to all, and often hard to be borne by the weak, the exhausted, or the invalid. This consideration is one of no small account, when it applies to forty or fifty thousand *people* a day, of all ages, sexes and conditions of health. 301

The saving of ten or even five minutes on a four mile route, when it is multiplied by the vast number of persons experiencing its benefit, including the bulk of the active business community of this great emporium and metropolis, is a point, also of no trifling importance. 302

The presence of rails along the middle of the street and the regular movement of the passenger travel along those lines of motion alone, will render practicable the enforcement of the rule, 303 (now merely nominal) which requires all vehicles to *keep to the right*. On each side of the street, the miscellaneous vehicles would thus move only in the same direction with the cars on that side. It would soon be as unheard of a thing for any vehicle to move on the wrong side, or against current, as it now is for them to drive upon the side-walk. It would be the interest of the rail road establishment to be attentive to the enforcement of this salutary ordinance, and indeed it would not be long necessary to give any particular attention to its enforcement; no one would think of disturbing *the order and comfort of the street*, by attempting to move against a regular and steady stream, instead of falling in, for his own convenience as well as according to law, on his own proper and visibly defined side. There would thus be no meeting of vehicles from opposite directions, with the mere exception of when one should cross the street to draw up on the opposite side. It is evident that a much larger number of vehicles could thus move 304 with ease and security within a given width of carriage-way, than where the same system of harmonious and regular *order* should not prevail. The Committee are satisfied that there is no exaggeration in the opinion which has been expressed, that this improvement in the general travel of Broadway would make the street comfortably available to the use of full three times the number of miscellaneous vehicles that now venture upon it; especially when it is remembered that, as has been seen above, full three-fifths of the carriage-way is now really occupied by the omnibuses, for which it is assumed that (through some proper and equitable arrangement) the proposed

reduced number of cars would be substituted. If, then, by *wise* and economical improvement, Broadway can be made 306 adequate to move a *doubled* passenger travel, and a *trebled* movement of miscellaneous vehicles, and to do so with great enhancement of comfort and security to both, such improvement would be practically equivalent to a corresponding widening of the street itself.

Another important advantage (in reference to the safety of crossing pedestrians, as well as of vehicles, whether in motion or drawn up at the curb-stone,) would be derived from the confinement of the whole passenger travel to the fixed iron lines from which it could not deviate. Everybody would *then* 307 know exactly where and how to avoid all danger or annoyance from the vehicles conveying that travel. Under the present system, safety from those vehicles is nowhere to be found, except on the very side-walks. Often several abreast; often racing, more or less decidedly; often coming together, from the opposite directions, with little, if any, regard to the rule of all to the right; often tacking about the street in defiance of it, from the eagerness to secure passengers who might otherwise fall to the lot of a rival; the omnibuses are, and under their system, must continue to *be*, a constant source 308 of peril to both pedestrians and vehicles, everywhere threatening with opposite and confusing dangers, requiring a constant vigilance to avoid them, and often impossible to be avoided, as is attested by so many serious, and sometime fatal accidents. Under a rail road system, this would be entirely changed.— Every one would always know exactly where he was secure from any possibility of contact with a car; the moment one had passed, he would be safe to cross its track, its successor

being at least a couple of blocks, if not twice that distance off; 309 racing would be out of the question; and, for safety from other vehicles, he would only have to look out in one direction, since all in motion on that side would necessarily be going one way.

Another point of some moment, is the saving of the pavement of Broadway, which would result from causing all the passenger travel to run on the iron rails, instead of in omnibuses on the pavement, as at present. This saving will be not alone in the cost of the repairs, but in the relief of the street from the frequent closing up of portions of it, for the 310 purpose of making them. Whatever parties should lay the rail road, should be required to keep it in constant repair, which could then be done by constant and close care, with night work, and early morning work, to repair the first appearances of yielding. The bulk of the wear and tear of the pavement is done by the omnibuses; and even the earlier blocks of the Russ pavement now show plain indications of yielding to the severe wear of the incessant crowds of them over all parts of the surface of the street.

311 The relief of the street from the noise of these *peculiar* vehicles would also be an essential improvement to Broadway, as well for the comfort of the residents, by night and by day, as for that of shoppers and other pedestrians, and of the riding passengers. And if, at the same time, the parties receiving the privilege are required to sweep the street at an early hour every morning, a great benefit will be reaped by the whole public, in exemption from mud, and from dust, in protection of fine goods from injury from the latter cause, and in cleanliness of the pavement for crossing at any point.

Objection *has* been made on the score of the narrowness of 312 the street, on the presumption that there would not be room for the movement of other vehicles, besides the cars. But there is no real weight in this objection. If the street is too narrow for the movement of one car, that is no very good reason why half a dozen omnibuses should be put upon it to do precisely the work that could be done by the one car. And this is the true question—which of the two will load the limited width of the street most, the *one car, or the half a* 313 *dozen omnibuses?* We have already seen that this reduction of the number of vehicles and horses devoted to the passenger travel, coupled with the simultaneous and consequent methodizing of the travel, on the law of keeping to the right, will enable Broadway to yield comfortable accommodation to at least three times the number of miscellaneous vehicles that now, (at their peril,) venture on it.

These vehicles will not only have the portion of the street lying on each side of the track exclusively to themselves, but will, of course, move as freely on their half of the middle of 314 the street as at present, whenever there should chance to be more than two abreast going the same way, or whenever one should wish to pass ahead of other vehicles moving before him, or when a cart might stand across the way.

On such rare occasions, though such a cart would for the moment, annoy the travel a little, by compelling other vehicles to go round it, yet the inconvenience would be much less when, in addition to the cart so situated, there should be one car passing, than when there should be half a dozen omnibuses

315 forcing *their* way through the same space. No vehicle driving along Broadway could ever come into collision with a car, except by its own fault, because it would have no more right on the opposite side of the street, (except for drawing up at the curb,) than it would have to intrude on the side-walk. The car on its own side of the street could never annoy it, because both would be moving the same way. Few drivers of any kind of vehicle, would wantonly annoy the passengers in a car, 316 by blocking the way of its passage by slow *driving* ahead of it. The good sense and good feeling of the community would soon put down such conduct; and there would be no need of resorting to the unquestionable authority of the Common Council to abate the public nuisance of such a practice, by the proper ordinance, which the whole community would demand for such cases.

Whenever a vehicle should find itself in such a situation, in reference to a car coming after it faster than its own rate, the usual courtesies and decencies of the road would rarely be 317 wanting on either side; and, by either the *one* holding up a little, or the other turning off a little further to the right, there would be no difficulty in the mutual accommodation.

In regard to the narrower portion of Broadway, between Fulton and Rector streets, (between which points it contracts considerably from its ordinary width,) the Committee have determined, that it would be a very valuable improvement, in any rail road system to be established, to restrict the number of cars which should be allowed to go below the Park, to such number as should be found sufficient for the accommodation 318 of so much of the travel as requires to pass below that point.

If from the foot of the Park, connecting lines of omnibuses should branch off to the Courtlandt street ferry, by Fulton or Vesey street, on the one side, and to the Peck Slip, Fulton and Wall street ferries, on the other side, (these omnibuses connecting, by transfer tickets, with both the Broadway and Harlem Rail Roads, or running at very low fare,) a complete system of public accommodation would be produced. These connecting lines would run across from river to river, and connect the corresponding ferries. The communications with the South ferry *would* be maintained by the rail road, though 319 only a small proportion of the cars would be required for that purpose, and for the way accommodation of that line of travel. Probably not more than a car to a quarter of a mile would be called for, for this purpose ; and, instead of the present crowding of that narrow part of Broadway with empty omnibuses, the greater part of the cars would stop at the Park, there to be immediately switched over to the return track. Experience would determine the proportion that should go on to the South ferry, which *could* be made distinguishable by color, or 320 by a suitable flag; so that passengers could take one or another, according to their preference. A further useful feature, in regard to the omnibuses connecting the ferries with each other, and with the two rail road lines at the Park, would be, that they should go and return by different streets, in consequence of the narrowness of the streets along those branching routes.

Besides the great increase of accommodation thus to be furnished, such an arrangement would afford an immense relief to all the lower part of Broadway, multiply the number of other *vehicles* to which it would be available, remedy its 321

present constant liability to crowds and jams; and, in all points of view, improve it for all business purposes.

A similar policy of spreading laterally or cross-wise, over the eastern and western, middle, and upper regions of the city, the facilities of public conveyances, directly connecting the two river sides of the city with each other, and also with all the more central portions of it lying on the lines of Broadway and the various other north and south lines of rail road movement, would, if carried out on an extensive and comprehensive *plan*, afford to New-York a network system of internal communication or circulation unrivalled in the world. This could be effected by withdrawing the omnibuses from Broadway, and placing them on these transverse routes at proportionately reduced fares—at such intervals, reasonably close, as should be found expedient. There would then be no part of the city where an individual could not find, close at hand, or within a very short walk, the means of regular and prompt conveyance, for a trifling sum, either to the central line, or by means of the various rail road lines already built, or which will be built, (of which the Broadway line is but one,) up or down, to the close vicinity of any other part of the city.

Every ward, district and block, would soon feel the vivifying influence of such all-pervading facilities of circulation. All property now suffering from the want of those means of cheap conveyance possessed by more favored localities, would soon experience its benefit. It would diffuse more equally, over all parts of the city, those advantages of eligibility for residence, and consequent rent value, and progress in im-

provement, *now* monopolized by the routes of public convey- 324  
ance. The cross lines of travel would themselves also soon  
be laid down with rails, so soon as the amount of travel  
should reach the point at which, (as now on Broadway, on a  
larger scale,) it should begin to oppress the street with the  
number of omnibuses employed by it, so as to call for the in-  
troduction of the *rail road economy in transportation*; for, as  
has been remarked in the discussions before the Committee,  
a city rail road is simply a labor-saving machine, by which a  
pair of horses, and *vehicle* of given width, can be made to move 325  
five or six times as many passengers, and in a much more  
comfortable way than can be done without it; and whenever  
the travel to be moved comes to crowd a street inconveniently  
with omnibuses, it will then pay, and justify the substitution  
of the rail conveyance, which private enterprise, wisely and  
fortunately coincident with the public good, and finding its  
own interest in the public accommodation, will never be slow  
to introduce.

Taking this enlarged view of the whole subject:—desiring  
to deal with it as becomes the *municipal* legislation of a rap- 326  
idly progressive city, already the metropolis of the New  
World, destined, within the lifetime of infants now born, to  
become the metropolis of the globe; and, moreover, at the  
same time paying a due regard to the meritorious interests of  
that large and valuable portion of our citizens, who are al-  
ready connected, through investment or employment, with the  
various Broadway omnibus lines, some of the members of the  
Committee determined to suggest to the applicants for the  
Broadway rail road, the propriety of some amicable and  
just arrangement, by which the broad and far-reaching 327

benefits of this general policy should be secured to the city, the rights and interests involved in the Broadway omnibus concerns protected and satisfied, and Broadway effectually relieved from the presence of the omnibuses simultaneously with the introduction of the substituted system of cars. We have the gratification of now knowing that such arrangements have been made to the satisfaction of both sides, and to the very great advantage of the public at large, in an admirable and complete system for a general circulation of the public conveyances, such as has been above indicated.

328 The proprietors of all *the* principal Broadway lines have accordingly agreed to unite with the applicants for the rail road, and all their omnibuses will be withdrawn and transferred to cross streets, at reasonable intervals, (subject to direction of the Common Council,) to work in correspondence with the rail road, with mutual transfer tickets to and fro. The extension of the same transfer system to the other rail road lines will, undoubtedly, soon follow, working itself out naturally, without need of legislative dictation. Such a result, if consummated by the approval of the Common Council, will undoubtedly, constitute such a great, wide-reaching, and manifold benefit to *the* whole city and community, as to make the act by which it shall be secured, (in the opinion of this Committee,) an act of wise and enlightened legislation, second only in value to that which bade the Croton to flow through every street and alley of our favored metropolis.

A few objections to a rail road in Broadway were adduced in the course of the discussions of a minor character, which would have in themselves but little weight in the scale, against the advantages of a reform which we have seen to

have now become indispensable, for the relief of Broadway, and the accommodation of the travel; and these small difficulties are also, for the most part, obviated under the harmonious and combined system now contemplated. 330

On those occasions of public processions or parade, for which our citizens want the accustomed panoramic opportunity afforded by Broadway, the cars would suspend running during the necessary hours, and a sufficient number of omnibuses could be withdrawn, or thinned out, from the cross lines or could be brought in from reserves in depot to accommodate on the next parallel street, the small amount of travel which, at those hours, and on such occasions, would want accommodation, as the omnibuses now take these routes when 331 shut off from Broadway. In the case of any interruption of running for any particular short distance from any other cause, the same provision would be always available to fill the gap of interruption on the rail road.

For the occasions of snow, the Rail Road Company should be required to keep in readiness an ample provision of sleighs. Builders' materials ought no longer to be allowed to encumber the street, as has hitherto been needlessly and negligently permitted. One or two other trifling points have been alluded to, which is not *worth* while to waste time upon. 332

In regard to the practical working of a Broadway rail road, there are several points of detail, which ought to be properly provided for, in order to secure the rights of the public to accommodation, in the proper sense of the term, as contradis-

tinguished from the treatment to which on some of the other lines the passenger is now really subjected.

There should be comfortable seats for a given number, and when the car is full, notice of the fact should be given by a 333 flag; and the car should not be allowed to *force* any more into insufficient sitting room, nor to force gentlemen to give up their seats to ladies, it being also, undoubtedly more agreeable to the latter to wait for a succeeding car, than to inflict that compulsion.

The cars should be so constructed as not to allow the packing of a standing crowd against the knees of the seated passengers, nor the obstruction of the passage-way for ingress and egress.

A car should never be allowed to stop at such a point as to block a cross street. Nor, except in rainy weather, or on 334 special occasions, for *good* reason, should the cars be allowed to stop more frequently in a block of ordinary length, than just beyond its corner crossing. The public would then always know where to take the car, and the passengers would be saved the annoyance of needless stoppages at distances of a few feet.

The Rail Road Company should be required to keep at those points (at least for all the more crowded parts of Broadway,) subject to regulation by the Mayor, a respectful and respectable attendant, distinguishable by a proper badge, whose duty 335 it should be to help in and out those to whom *such* assistance

should be desirable, such as ladies, children, or the infirm, and in general to watch over the safety of all passengers from all dangers of passing vehicles.

The rails laid down should be such as to avoid the fault of those of the Sixth and Eighth Avenue Rail Roads, which have grooves so wide as to admit wheels, which then are subject to annoyance in getting out. The applicants should be required to lay them carefully even with the surface and with an inch groove, too narrow to give rise to any similar trouble. This will indeed require *a* larger force of men, and more constant care along the line of the tracks to keep them clear, but this is a condition which can be fulfilled, and should be exacted. 336

And finally, as a means of securing the passengers against dust in the cars, and against mud in getting to and from them, it would not be unreasonable to require a Broadway Rail Road Company to sweep the street at an early hour every morning. The present applicants having agreed to do this, and also to keep in repair all the portion of the street traveled by *them*, the incidental benefit to the stores, residents, and 337 pedestrians on the street, will also be great. All these points have been held in view in the resolutions which the Committee have decided to report to the Board.

Some doubts have been expressed about the authority of the Common Council to confer the privilege of laying down a Broadway Rail Road. The right stands now fully established by the Supreme Court of the State, after full discussion, and

is law, until it shall be reversed by the Court of Appeals; of  
338 which, little likelihood is apparent. It has not hitherto been  
even appealed from. Permission to lay rails, with license to  
run cars upon them, confers no exclusive use of that portion  
of the street. A car moves on its route as an omnibus would  
do, the difference being that there is *one* of the former to *half a dozen* of the latter, and that it cannot run over or foul of any  
thing which does not place itself needlessly in the way.  
*Regulation* of the use and travel of the street, in such way as  
shall be deemed most conducive to the public convenience, for  
339 *those* purposes, is an unquestionable incident to the Municipal  
authority, as it is also covered by the express terms of the  
charter. If on any particular street there is a great move-  
ment of carriages, carts, &c. up, and the same down, and  
moreover a heavy movement of passenger travel, employing a  
great number of peculiar vehicles, it is the evident right of the  
city government to prescribe, for the better accommodation of  
all, that all the first-named shall move on the one side of the  
street alone, all the second on the other side, and that all the  
340 third *shall* confine itself to the middle; and, though the other  
two portions of the general movement of vehicles on the street  
may also move on that middle portion, yet that they shall all  
keep to the right, as much as possible, and shall not, by need-  
less slow driving on the middle, when they have room to turn  
out of the way, block the passage of the middle vehicles de-  
voted to the vast and necessary service of the passenger  
travel. Such distribution and methodizing is clearly within  
341 that plain power of *regulation*, which is also a plain *necessity*  
in regard to any great central avenue like Broadway, suffering  
both from the over-crowd, and from the want of precisely  
such regulation.

The whole subject of the powers of the Common Council, is discussed in an elaborate opinion of the present Counsel to the Corporation, clearly establishing the following conclusions :

“ *First.* That the Corporation possess full power to grant the privilege of establishing rail roads through the streets and avenues of the city.

“ *Second.* That the Corporation cannot legally engage in the enterprise of building and conducting a rail road, without an express grant from the legislature therefor, and that to 342 use the public moneys for such purposes, without further legislative authority, would be in violation of law;—and

“ *Third.* That the Corporation cannot exact any bonus or general compensation for the grant of the privilege of laying a rail road upon or through the streets of the city; but a charge upon each car for the license to run, may be imposed under the provisions of the acts of 1813 and 1824, above cited.”

The 272d section of the act of 1813, and the act of February 21<sup>st</sup>, 1824, contain the only provisions of law which 343 authorize the charge of a license fee to public carriages for hire. Chancellor Kent, in his Notes, held those provisions to be equally applicable to omnibuses; and there can be no question but that they are equally applicable to cars, which are only an improved kind of vehicle, designed and used for the same purpose, namely : the conveyance of passengers for hire,

and which are made practicable by the use of iron rails for them to move easily upon. Without these provisions of law, 344 (as is already set forth in the opinion referred to,) there would be no legal authority "to justify *any charge* for the privilege of running them upon and through the public streets." The act of 1824, increasing the license fee before permitted by law to be charged, made twenty dollars its highest amount for each vehicle; and the Counsel to the Corporation reasonably remarks, that these charges "do not appear to be granted as sources of revenue, but simply as a remuneration for the damage or injury occasioned by the special use of the street by public 345 *vehicles*. No charge is authorized in reference to private carriages, but the power is limited to these vehicles that are constantly being driven upon and over the pavement." When running upon iron rails, no injury at all can be done to the pavements.

Even if the Common Council possessed the power to exact or receive a bonus or price for the privilege of laying a street rail road, the Committee are not of opinion that such policy would be a wise one. It would be a mere indirect mode of 346 taxing the travel, as is done, at great and just public *odium*, by New Jersey, without the poor reason that it is a transit travel of the citizens of other States. Thus to sell out a right of this nature, if it could lawfully be done, would be to give such a right to the purchaser as would make him, for his term of lease, more independent of control and regulation than it would be desirable that he should be. A higher, as well as wiser policy, is to license him for a reasonable term, but without contracting the legislative discretion of succeeding 247 Common Councils to regulate his performance of the service,

if he shall not give entire satisfaction; to require from him broad conditions of public accommodation and benefit; and to make it his constant interest to preserve the continued favor of the public, by deserving it, and by studying constantly to extend and improve the public accommodation; in parallel lines with which, he should be required to see and pursue the interest of his own enterprize. Even if the Common Council had the power to construct and work a rail road itself, which it has not, there is no doubt that it would be far better done by *a* company, under such judicious stimulus of 348 private interest, made coincident with the public accommodation. This is not one of those cases which fall within the general objections to monopolies. A rail road system essentially requires *unity of administration*; nor can a single street admit of two competing lines. The only competition which the case admits of, is that afforded by the various lines of streets tending in similar general directions; and ready facilities should be allowed for establishing such competing lines, whenever asked for by parties entitled to confidence for the satisfactory fulfilment of their proposed undertakings. The *policy* above indicated is the true one for such cases; nor can 349 there be any reason to apprehend any want of that attention and vigilance on the part of the public, which must always keep a company managing a Broadway rail road under a constant tension of interest, prompting to constant care and wise liberality for the public accommodation.

The applicants for the privilege of creating and rendering the very great public service which we believe this to be, and which we think we have demonstrated it to be, are a body of very respectable, substantial, and practical citizens; of per-

350 fectly *satisfactory* responsibility for their great proposed undertaking, both in point of means, character, and intelligence. Their proceedings in regard to it have been marked with a high propriety, which commends them favorably to consideration, with months of time, and large expenditure devoted to public discussion and investigation into all the merits of the question involved. No project, not good in itself, or other than honest and honorable in its prosecution, could ever possibly survive such an ordeal as has been from the outset courted by the applicants in this case. The pre-  
351 cedent will remain an useful one; the more so, when it shall be seen that such modes of prosecuting such undertakings are most successful in the end, though arduous, and perhaps hazardous, in the beginning. They have readily consented to enter into the large and comprehensive plan of general policy explained above, for spreading over the whole extent of the city those facilities of public conveyance which are to carry improvement and progress wherever they reach. This must necessarily involve heavy original outlay, superadded to the cost of laying and equipping their own proposed road; and this assumed burthen of establishing numerous cross routes,  
352 (with the omnibuses withdrawn *from* the Broadway routes,) out of the usual directions of the city travel, is a large and problematical undertaking. This may be onerous upon the central rail road, however beneficial for the public accommodation, to the convenience and value of extensive regions of city property, now obscure and languishing, if not retrogressive, and eventually to the city treasury, which, (from all such improvement of property, and from all those improved facilities of communication tending to diminish the motives which now drive so many of our business community to what

may be called foreign residence,) will, in the end, derive much greater *benefit* than could now be drawn from any bonus or 353 price, were such within the scope of either the policy of the powers of the Common Council, in the exercise of its trust of the public streets.

The petitions for, and remonstrances against, the proposed rail road, exhibit signatures not less than about sixty-four thousand in number, being about equally divided in point of number. As has already been remarked, the weight of all this opposition has been subsequently greatly lightened, if not wholly removed, by the fact of the later testimony in favor of a rail road on its own *merits*, which has been virtually and practically rendered by its prominent opponents; and moreover, inasmuch as very nearly all these names to remonstrances were procured by the parties interested in the omnibus lines, it is fairly presumable that the bulk of them were given, either under the presumption that the Broadway omnibuses and the railway cars were both to run on the street, already so much overcrowded by the former, or from regard to the interests of the omnibus lines; and, consequently, after an arrangement and agreement satisfactory to the latter, and effecting, in an amicable way, the withdrawal of the omnibuses, and their 354 transfer to the cross routes, as above explained, all the weight of the greater part of those opposition signatures is withdrawn from the case. Moreover, if so large a number of our citizens, as between thirty and forty thousand, have signed petitions in support of the application, without any certainty about the withdrawal of the omnibuses, how much larger would probably have been the number—it may reasonably be presumed—had that necessary condition for the convenient working of 355

a rail road been earlier secured. Numerous changes of opinion, in favor of the project, *have* taken place—former opponents having become strong friends. A considerable number of property owners on Broadway seem still, through their representatives, to maintain a certain attitude of opposition; but that opposition is materially qualified by the subsequent offers of the same parties to be themselves the parties to build the road. Some of the most intelligent and wealthy property owners on Broadway are decidedly in favor of it; and the Committee believe that few would now oppose it, coupled with the condition of the amicable withdrawal of the omnibuses, and their transfer to cross connecting routes. Even 357 *before* that important object was attained, it appears that about seventeen hundred residents and occupants on Broadway itself, were among the petitioners in favor of the application.

Enough has already been said above, to show to the satisfaction of unprejudiced minds, according to the best judgment of the Committee, that the intended substitution, made in pursuance of that general law of progress which everywhere replaces stages with rail roads on all lines of large and steady travel, will, and must necessarily bring with it great benefit, instead of injury, to all persons doing business, as well 357 as those owning *property* along its line; since it will facilitate the conveyance up and down; accommodate much larger numbers of passengers; attract greater numbers into Broadway; essentially relieve the carriage-way, and accommodate many more vehicles of business or pleasure; and, at the same time, improve the comfort of both residence and movement along the street, in reference to the noise, dust, mud

and confusion. These improvements must soon tell, sensibly and beneficially, on the business and property, as has been truly foreseen by large numbers of very intelligent citizens interested therein. At the same time, they will *postpone*, if not 358 wholly avert, the necessity, otherwise imminent, of draining off along other outlets a large portion of that movement of travel and pedestrians from which the great prosperity and value of Broadway are derived.

When the whole question is reviewed in the light of the reasons above exhibited in its favor ; when the necessity is fairly considered, which calls upon us to improve all the facilities of communication between the lower business parts of the city, and the upper portions, in order to counteract the temptations which attract so many of our business men to the now more *accessible* residences, which they can so quickly and pleasant- 359 ly reach by so many ferries, and when it is regarded as part of a broad and general policy, the benefits of which are to pervade the remotest parts of the city, while Broadway itself will reap the benefits which must result to its business and property, from the doubled number of passengers, and trebled number of miscellaneous vehicles, to which the rail road reform of the street will furnish comfortable accommodation,—there can hardly be a doubt that all opposition will speedily vanish, and most of it be converted indeed, *into* cordial approbation. 360

In accordance with the views above expressed, the Committee have determined to recommend the granting of the privilege asked for by these applicants, with a view to which, they recommend the adoption of the following resolution :

*Resolved*, That Jacob Sharp, Freeman Campbell, William B. Reynolds, James Gaunt, I. Newton Squire, Wm. A. Mead, David Woods, John L. O'Sullivan, Wm. M. Pullis, Jonathan Roe, John W. Hawkes, James W. Faulkner, Henry Dubois, John J. Hollister, Preston Sheldon, John Anderson, John R. Flanagan, Sargent V. Bagley, Peter B. Sweeny, Charles B. 361 White, James W. Foshay, Robert E. *Ring*, Thomas Ladd, Conklin Sharp, Samuel L. Titus, Alfred Martin, D. R. Martin, William Menzies, Charles H. Glover, Gershon Cohen, and those who may for the time being be associated with them, all of whom are herein designated as associates of the Broadway railway, have the authority and consent of the Common Council to lay a double track for a railway in Broadway and Whitehall or State street, from the South Ferry to Fifty-ninth street; and also, hereafter, to continue the same, from time to time, along the Bloomingdale road to Manhattanville, which 362 continuation they shall be required, *from* time to time to make, whenever directed by the Common Council, the said grant of permission and authority being upon and with the following conditions and stipulations, to wit,

*First.* Such tracks shall be laid under the direction of the Street Commissioner, in or near the middle of the street, the outer rails not exceeding twelve feet six inches apart, and the rails being laid flush and even with the pavement, the inner portion of the rail being of equal height with the outer, with grooves not exceeding one inch in width, or such other rails 363 as shall be *approved* by the Street Commissioner or the Common Council, *on* such grades as are now established, or may hereafter be established, by the Common Council; and the said associates shall keep in good repair the space between

the said rails, and one foot on each side; and no motive power, excepting horses, shall be used below Fifty-ninth street.

*Second.* The said associates shall place new cars on said rail road, with all the modern improvements, for the convenience and comfort of passengers. And they shall run cars thereon, every day, both ways, as often as the public convenience may require, under such direction as the Common 364 Council may, from *time* to time, prescribe. Said cars, with horses attached, not to exceed forty-five feet in length.

*Third.* The said associates shall, in all respects, comply with the directions of the Common Council in the building of such railway, and in the running of the cars thereon.

*Fourth.* At the Bowling Green, the said associates may divide the two tracks aforesaid, running one of them down Whitehall street, and the other down State street, should they deem such division necessary; and also, whenever in the course of their route the *said* road shall pass a public square, 365 it may be carried with a single track, round both sides of said square, instead of only one, for the better accommodation of the public on both sides thereof.

*Fifth.* The said associates shall be required to procure a depot, at some place near or at the lower part of said route, for the purpose of keeping withdrawn from Broadway such proportion of the cars coming down in the morning as shall not be required for the accommodation of the return travel until the afternoon; and also, they shall *be* required to stop 366

a portion of the cars at the Park, and to send *down* below that point no greater proportion of the whole number employed, than shall be found by experience to be requisite for the accommodation of the travel below that point, subject to regulation by the Common Council.

*Sixth.* The cars shall be so constructed as not to make provision intended for standing passengers to crowd upon the seated passengers; and also, when all the seats are full, the cars shall not be stopped to take in more passengers to be 367 crowded into the said *seats*; a flag being displayed in front of the car to give notice that all the seats are full.

*Seventh.* The said cars shall not be allowed to stop, so as to obstruct a crossing, nor to stop more frequently in a block (unless the same be of extraordinary length) than just beyond its first crossing, except in rainy weather.

*Eighth.* The said associates shall keep an attendant, distinguishable by some conspicuous mark or badge, at every such appointed stopping place, in all parts of the street 368 usually much crowded with vehicles, whose duty it shall be, with attention and respect, to help in and out of the cars all passengers who may desire such assistance, and in general to watch over the safety of passengers from all dangers of passing vehicles.

*Ninth.* The said associates shall be required to keep, or cause to be kept in readiness, a number of sleighs adequate to the public accommodation, when the travel of the cars may be obstructed by snow.

*Tenth.* The said associates shall cause the said street to be well swept and cleaned every morning, and the sweepings carried away, before eight o'clock in summer, and *nine* 369 o'clock in winter, except Sundays; this provision applying to the whole of the *street* south of Fourteenth-street, above which point the same shall be done as often as twice a week when the weather will permit.

*Eleventh.* No higher rate of fare shall be charged for the conveyance of passengers from any one point to any other point along said route, and such combined system of routes as may hereafter be adopted by means of cars and transverse omnibuses, than five cents for each passenger.

*Twelfth.* In consideration of the good and faithful performance of all these *conditions*, stipulations and requirements, 370 and of such other requirements as may hereafter be made by the Common Council, for the regulation of the said railway, as aforesaid, the said associates shall pay, for ten years from the date of opening the said railway, the annual license fee for each car now allowed by law, and shall have a license accordingly; and after that period, shall pay such amount of license fee, for further licenses, as the Corporation, with permission of the Legislature, shall then prescribe; or, in default of consenting thereto, shall surrender *the* road, with all the 371 equipments and appurtenances thereto belonging, to the said Corporation, at a fair and just valuation of the same.

*Thirteenth.* Within a reasonable time after the passing of this resolution, the said associates, or a majority in interest thereof, shall form themselves into a joint stock association, which association shall be vested with all the rights and privileges hereby granted, and shall have power, by the votes of at least a majority in interest of the associates, to frame and establish articles of association and by-laws, providing for the 372 construction, operation, and management of the *said* railway, the mode of admitting new associates, and of transferring the shares or interests of any of the associates to new associates or assigns, the number, duties, mode of appointment, tenure, and compensation of officers, the manner of making contracts, amending the by-laws, and calling in assessments from the associates, and generally the means and mode of establishing the railway and carrying it on, and of controlling and managing the property and affairs of the said association.

*Fourteenth.* The association shall not be deemed dissolved 373 by the death or act of any associate, but his successor in *interest* shall stand in his place; and the rights of each associate shall depend on his own fulfilment of the conditions imposed on him by these restrictions, or the articles of association and by-laws of the association; and in case of his failure to fulfil the same, after twenty days' notice in writing to him so to do, his rights shall be forfeited to and devolve upon the remaining associates. And said associates may, at any time, incorporate themselves under the general Rail Road Act, whenever two-thirds in interest of the associates shall require it.

*Fifteenth.* The associates, whose names are set forth in this 374 resolution, shall by writing, filed with the Clerk of the Common Council, signify their acceptance thereof, and *agree to* conform thereto ; and all new associates or assigns, duly admitted according to the provisions of the articles of association, and by-laws, shall be deemed parties to such agreement.

All of which is respectfully submitted.

OSCAR W. STURTEVANT,  
ABRAHAM MOORE,  
WM. J. BRISLEY,  
JAMES M. BARD, } *Special Committee.*

375

At a Special Term of the Superior Court  
of the City of New-York, held at the  
City Hall, in said City, on the fifth  
day of February, A. D. 1853.

PRESENT—HON. JOHN DUER, *Justice.*

Thomas E. Davis and Courtland Palmer,

*vs.*

The Mayor, Aldermen and Commonalty of  
the City of New-York.

On reading and filing affidavits of Henry Hilton, Malcolm Campbell, and William McMurray, herein, and the order granted thereon, by Justice Emmett, for Oscar W. Sturtevant, one of the Aldermen, above named, to show cause why attachment should not be issued against him, for contempt of Court, in disobeying the injunction issued, and served in this action upon him.

376 On motion of Greene C. Bronson and *John Van Buren*, Counsel for plaintiffs; and after hearing Charles O'Connor, Counsel for the defendants, and David Dudley Field, Counsel for said Alderman, Oscar W. Sturtevant, in opposition thereto;

*Ordered*,—that an attachment for a contempt, in disobeying said injunction be issued against the said Alderman Oscar W. Sturtevant, returnable at a Special Term of this Court, to be held at the City Hall, in the said City, on the twelfth day of February, instant, at 11 o'clock, A. M.

And it is further ordered, that the said Alderman Oscar W  
377 Sturtevant be held to bail in the sum of five hundred dollars

## SUPERIOR COURT.

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Thomas E. Davis and Courtlandt Palmer,  
*against*  
 The Mayor, Aldermen and Commonalty of  
 the City of New-York.

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The defendants hereby appeal to the general term of this court, from the order made herein at the special term of this court, on the 5th day of February, instant, that an attachment issue against Oscar W. Sturtevant, for contempt, in disobeying the injunction issued in this action.

Dated February 9th, 1853.

Yours, &c.

ROBERT J. DILLON,

*Attorney for Defendants.*

*To McMURRAY & HILTON, Esqr's Plaintiffs' Attorneys; and  
 To ROBERT G. CAMPBELL, Clerk of the Superior Court.* 378

## SUPERIOR COURT.

Thomas E. Davis and Courtlandt Palmer,  
*against*  
The Mayor, Aldermen and Commonalty of  
the City of New-York.

The undersigned, Oscar W. Sturtevant, hereby appeals to the General Term of this Court from the order made herein, at the Special Term of this Court, on the fifth day of February, instant, that an attachment issue against him for contempt in disobeying the injunction issued in this action.

Dated February 9th, 1853.

Yours, &c.

OSCAR W. STURTEVANT.

To McMURRAY & HILTON, *Plaintiffs' Attorneys.*

ROBERT G. CAMPBELL, *Clerk of the Superior Court.*

At a Special *Term* of the Superior Court of the 379  
 City of New-York, held at the City  
 Hall, in said City, on the twelfth day  
 of February, in the year 1853.

PRESENT—Hon. JOHN DUER, *Justice.*

Thomas E. Davis and Courtlandt Palmer,  
 against  
 The Mayor, Aldermen and Commonalty of  
 the City of New-York.

The People of the State of New-York, ex rel.  
 Thomas E. Davis and Courtlandt Palmer,  
 against  
 Oscar W. Sturtevant.

An order for an attachment having been made and entered  
 in the first above entitled cause, against Oscar W. Sturtevant,  
 Alderman of said city, for contempt of Court in disobeying the 380  
 injunction granted in said action and attachment against said  
 Sturtevant, returnable this day having been issued to the  
 Sheriff of the city and county of New-York, bailable in \$500,  
 pursuant to said order; and said Sheriff having made return  
 that he had attached said Sturtevant as required by said at-  
 tachment, and had let him at large upon his giving surety, as  
 appears, by the Bond annexed to said attachment.

Such bond bearing date Feb. 8th 1853, made and executed by said Oscar W. Sturtevant, Luther R. Marsh and Hezekiah B. Loomis, to John Orser, Sheriff of the city and county of New-York, given upon the arrest of said Sturtevant, under said attachment, and conditioned that the said Sturtevant should appear on the return of said attachment, and abide the order and judgment of the court thereupon, said bond being in the penalty of \$500.

And Mr. Sandford and Mr. Field, on the part of the defendants, and of the said Sturtevant, having filed affidavits of the taking of an appeal to the general Term, from the order of the 382 5th instant, allowing the said attachment to issue and having objected to any further proceedings at the special Term till the determination of said appeal, which objection was overruled.

And the said Sturtevant being now in open court called, and failing to appear;

On motion of G. C. Bronson, Counsel for said plaintiffs,

It is ordered, that the default of said Sturtevant be, and the same is hereby entered; and that another attachment issue against the said Oscar W. Sturtevant, directed to the Sheriff of the City and County of New-York, returnable on the nine-383 teenth day of February instant, at eleven o'clock, A. M., before a special term of this court, to be held at the City Hall, in said city.

And it is further ordered, that the said Sturtevant be held to bail upon such attachment in the sum of five hundred dollars.

And the said bond so taken being forfeited ; It is further ordered, that the same be prosecuted ; and that said Thomas ~~■■■~~ E. Davis and Courtlandt Palmer, the aggrieved parties, are hereby authorized to prosecute the same.

## SUPERIOR COURT.

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Thomas E. Davis and Courtlandt Palmer,  
*against*  
 The Mayor, Aldermen and Commonalty of  
 the City of New-York.

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384 The People of *the State of New-York*,  
 on the relation of Thomas E. Davis  
 and Courtlandt Palmer,  
*against*  
 Oscar W. Sturtevant.

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The undersigned, Oscar W. Sturtevant, hereby appeals to  
 the general term of this court from the order made at the  
 special term, on the twelfth day of February, instant, whereby  
 it was, among other things ordered, that his default be en-  
 tered; that another attachment issue against him, and that  
 the bond given by him on the former attachment be prose-  
 cuted.

New-York, February 14th, 1853.

Yours, &c.

OSCAR W. STURTEVANT.

To McMurray & Hilton, Esqr's, *Plaintiffs' Attorneys*.  
 R. J. Campbell, Esq. *Clerk*.

## SUPERIOR COURT.

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Thomas E. Davis and Courtlandt Palmer, <i>against</i> The Mayor, Aldermen and Commonalty of the City of New-York.	385
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The defendants hereby appeal to the General Term of this Court from the order made at the Special Term, on the 12th day of February, instant, whereby it was among other things ordered that the default of Oscar W. Sturtevant be entered, that another attachment issue against him, and that the Bond given by him, on the former attachment, be prosecuted.

New-York, Feb. 14th, 1853.

Yours, &c. ROBERT J. DILLON,  
*Attorney for Defendants.*

To McMurray & Hilton, Esqrs. *Plaintiffs' Attorneys, and* 386  
 To Robert G. Campbell, Esq. *Clerk, &c. &c.*

## SUPERIOR COURT.

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Thomas E. Davis and Courtlandt Palmer,  
*against*  
 The Mayor, Aldermen and Commonalty  
 of the City of New-York.

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The People of the State of New-York, on  
 the relation of Thomas E. Davis and  
 Courtlandt Palmer,  
*against*  
 Oscar W. Sturtevant.

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*City and County of New-York.*

OSCAR W. STURTEVANT, being sworn, saith, that the Order made at the Special Term, on the 5th instant, directing an attachment to issue against this Deponent was made by Mr. Justice Duer, assisted by Mr. Justice Campbell, Mr Justice Bosworth, and Mr. Justice Emmet, all of whom sat on the 387 argument, and *two* of whom, Mr. Justice Duer and Mr. Justice Bosworth, wrote and published Opinions on the Case; that after the Order was made, and while the attachment issued thereon was still in the Sheriff's hands unexecuted, this Deponent, and the Mayor, Alderman and Commonalty of the City of New-York, severally appealed from the said Order to the General Term of this Court, and served notices of their appeal on the Plaintiffs' Attorneys, and on the Clerk of this

Court: that, notwithstanding the said appeal, the Special Term proceeded to make the Order of the 12th instant, directing the *default* of this Deponent for not appearing upon 388 the said attachment to be entered, a new attachment to issue, and the bond given in the former attachment to be prosecuted; that, since the entry of the last mentioned Order, this Deponent has appealed from the same to the General Term of this Court, and hath caused notice of this appeal to be served on the Plaintiffs' Attorneys, and on the Clerk of this Court; but that, notwithstanding, and since the service of the said notices of appeal, the Plaintiffs' Attorneys have issued a new attachment against this Deponent, which is now in the hands of the 389 Sheriff, and have commenced an action against this Deponent and his sureties on said Bond.

OSCAR W. STURTEVANT.

Sworn to, this 16th day of February, 1853,

before me,

JOHN PHILLIPS, Com. of Deeds.

Upon the foregoing affidavit, and the orders therein mentioned, dated the fifth and twelfth instant, with the papers used on the motions for the said orders, let the plaintiffs show cause before this court, at a special term thereof, to be held at the City Hall, of the City of New-York, on the nineteenth day of February instant, at eleven o'clock, A. M., why the 390 said attachment should not be set aside, or such other order made in the premises as may be right.

JNO. DUER.

NEW-YORK, February 14th, 1853.

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*City and County of New-York.*

BENAJAH LEFFINGWELL, being sworn—saith, that on the sixteenth day of February instant, he served a copy of the foregoing affidavit and order, to show cause, on McMurray & Hilton, the plaintiffs' attorneys, in the above entitled action, by delivering such copies to Mr. Hilton, one of said attorneys, personally.

B. LEFFINGWELL.

391      Sworn, 16th Feb. 1853, before *me*,  
Wm. H. SPARKS, Com. of Deeds.

## NEW-YORK SUPERIOR COURT.

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THE PEOPLE, ex rel. &c. }  
against  
OSCAR W. STURTEVANT. }

At a Special Term of the Superior Court, held  
at the City Hall, in the City of New-  
York, on the 19th day of February,  
1853.

PRESENT, DUER, *Justice*.

Ordered, that the motion to set aside the attachment, issued under the order of the 12th instant, be, and the same is hereby denied. And it is further ordered, that the said Sturtevant be called on the said attachment; and, being called, and appearing, *it* is ordered, that interrogatories be filed, and that 392 the answer of the said Sturtevant to the said interrogatories be served on the plaintiffs' attorneys, on or before Thursday next; and that the argument on the said interrogatories and answer be adjourned into the General Term, to be there heard and decided on Saturday next.

## NEW-YORK SUPERIOR COURT.

THE PEOPLE, ex rel. &c.  
*against*  
 OSCAR W. STURTEVANT.

Special Term,  
 Feb. 26, 1853.

PRESENT, DUER, *Justice*.

Ordered, that that part of the order transferring the cause to the General Term, made February 19, be vacated.

## SUPERIOR COURT.

The People of the State of New-York, on  
 the relation of Thomas E. Davis and  
 Courtlandt Palmer,  
*against*  
 Oscar W. Sturtevant.

The said Oscar W. Sturtevant, hereby appeals to the general term of this court, from the order *made* in this proceeding at the special term, on the nineteenth day of February, instant.

New-York, February 25th, 1853.

Yours, &c.

OSCAR W. STURTEVANT.

To R. G. Campbell, Esq. *Clerk*; and

McMurray & Hilton, Esq's. *Plaintiffs' Attorneys*.

## NEW-YORK SUPERIOR COURT.

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The People of the State of New-York, *ex rel* }  
 Thomas E. Davis and Courtlandt Palmer, }  
 vs. }  
 Oscar W. Sturtevant. }

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Interrogatories to be administered to Oscar W. Sturtevant, one of the Aldermen of the City and County of New-York, upon an attachment issued against him, for contempt of Court, in disobeying a *certain* injunction order granted by one 393 of the judges of this Court, in a certain action, wherein Thos. E. Davis and Courtlandt Palmer, are plaintiffs; and the Mayor, Aldermen and Commonalty of the City of New-York, are defendants, and of which injunction order a copy is hereunto annexed, marked A.

The Relators allege, that on the 19th day of November, 1852, the Board of Aldermen of the City and County of New-York, a branch of the municipal corporation, known as the Mayor, Aldermen and Commonalty of the City of New-York, did, at a meeting of such Board, and by the votes of a majority of the members thereof, pass and adopt a grant or resolution, of which a copy is hereunto annexed, marked B. 394

That subsequently, and on December 6th, 1852, the Board of Assistant Aldermen, of said city and county, also a branch of said corporation, did, at a meeting of such Board, and by

the votes of a majority of the members thereof, concur with the said Board of Aldermen in the passage and adoption of said resolution or grant, and directed the same to be transmitted to the Mayor of said city for his approval.

That on December 18th, 1852, said Mayor returned said grant or resolution, together with his objections thereto, to said Board of Aldermen, where it originated.

That on December 27th, 1852, the relators, as two of the citizens and corporators of the said city, and as tax-payers therein to the amount of two hundred and fifty dollars per annum each, and also as owners of real property upon Broadway, in said city, commenced an action in the Superior Court of the city of New-York, as well on their own behalf as on behalf of all other corporators and tax-payers, who might be affected by the several matters set forth in their complaint in such action against the Mayor, Aldermen and Commonalty of the City of New-York, defendants therein.

And in and by the complaint in such suit, the relators demanded that an injunction order might be issued by this court directed to the said defendants, the Mayor, Aldermen and Commonalty of the city of New-York, their counsellors, attorneys, solicitors, and agents, restraining and enjoining them, 397 from granting, or in any way or manner authorizing Jacob Sharp and others, the persons named in said resolution, or their associates, or any other person or persons whomsoever, the right, liberty, or privilege of laying a double, or any track for a railway in said Broadway, from the South Ferry to Fifty-seventh street, or any rail way whatsoever in said Broadway,

or from breaking or removing the pavement, or in any other manner to obstruct the said street preparatory to, or for the purpose of laying or establishing any railway therein.

That on said December 27th, 1852, upon said *complaint*, 398 duly verified, the Honorable William W. Campbell, one of the Judges of said Court, duly granted said injunction order, of which a copy is hereto annexed, marked A.

That on December 28th, 1852, the summons, complaint, and injunction in said action, were duly served on the said Mayor.

That on December 29th, 1852, the summons and said injunction were also duly served on the said Oscar W. Sturtevant, who was, during the whole of the year 1852, and still is, one of the Aldermen of *said* city and county. 399

That afterwards, and on the evening of December 29th, 1852, said Board of Aldermen again met; and at such meeting, said Alderman Sturtevant called for the re-consideration of said resolution or grant was called for, and the same was then and there approved of, passed, and adopted by said Board of Aldermen, notwithstanding said objections of the Mayor, and in defiance of said injunction, and in contempt of the authority of this court;—a majority of all the members elected to such Board voting in favor thereof, and the said Alderman Sturtevant voting with such majority, in *favor* of passing and 400 adopting said resolution or grant. And at the time it was un-

der consideration and before voting thereon, stating that he had been served with said injunction, and had a copy of it in his pocket

That afterwards and immediately after the reconsideration, approval and passage of said resolution or grant in manner aforesaid, and at the same meeting, the said Alderman Oscar W. Sturtevant offered the preamble and resolutions, of which a copy is hereto annexed, marked C. and the same were upon his motion approved, passed and adopted by said Board of Aldermen  
 401 —a majority of all the members *elected* to such board voting in favor thereof, and said Alderman Sturtevant voting with such majority in favor of adopting said preamble and resolutions.

That subsequently and on December 30th, 1852, the said Board of Assistant Aldermen also approved, passed and adopted said resolution, marked B. notwithstanding said objections of the Mayor, a majority of all the members elected to such board voting in favor thereof, in defiance of said injunction and in contempt of the authority of this court.

*First Interrogatory.*—Were you not, during the whole of  
 402 the year 1852, one of the Aldermen of the city and county of New-York, and of the Third Ward in said city; and are you not now such Alderman?

*Second Interrogatory.*—Was not the injunction order granted in this action (and of which a copy is hereunto annexed, marked A.) served upon you on the 29th day of

December, 1852; was not such service made by delivering to you a copy, and at the same time showing to you the said original injunction order?

*Third Interrogatory.*—Were you present at a meeting of the Board of Aldermen of said City and County, on the 29th 403 day of December, 1852, when a majority of all the members elected to said board approved and passed a certain resolution or grant, (of which a copy is hereunto annexed, marked B.) notwithstanding the objections thereto of the Mayor of said city?

*Fourth Interrogatory.*—Did you or not, after the service of said injunction order on you, and at such meeting, call for the reconsideration of said resolution; and was not the same reconsidered and passed notwithstanding the objections of the Mayor, and notwithstanding said injunction order; and upon such reconsideration did you or not, together with a majority 404 of all the members elected to said Board, vote in favor of and assist in the adoption, approval and passage of said resolution or grant?

*Fifth Interrogatory.*—Did you or not, at such meeting and immediately after the adoption and passage of the resolution or grant aforesaid, offer to said board and move the adoption of a certain preamble and resolutions, of which a copy is hereunto annexed, marked C.

*Sixth Interrogatory.*—Did you or not at such meeting vote with a majority of the members of said Board in favor of, and

405 assist in the adoption and passage of *said* preamble and resolutions last mentioned, and was not said preamble and resolutions thereupon adopted by said board ?

*Seventh Interrogatory.*—Was not said resolution or grant, of which a copy is hereunto annexed, marked B. subsequently sent to the Board of Assistant Aldermen of said City and County ; and was it not on December 30th, 1852, approved, adopted and passed by the votes of a majority of all the members elected to such Board ?

McMURRAY & HILTON,  
Atty. for Relators, Davis & Palmer.

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A.

NEW-YORK SUPERIOR COURT.

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Thomas E. Davis and Courtlandt Palmer, }  
against }  
406 The Mayor, Aldermen and Commonalty of }  
the City of New-York. }

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It appearing from the complaint in this action, duly verified, that the plaintiffs are entitled to the relief demanded in the said complaint, and that *such* relief consists in restraining the defendants, as hereinafter provided :

Now, therefore, in consideration of the premises, and of the particular matters in said complaint set forth, I do hereby command and strictly enjoin the said defendants, the Mayor, Aldermen and Commonalty of the City of New-York, their counsellors, attorneys, solicitors and agents, and all others acting in aid or assistance of them, and each and every of them. That they and each of them do absolutely desist and 407 refrain from granting to, or in any manner authorizing Jacob Sharp and others, (the persons named in the resolution, of *which* a copy is annexed to said complaint, and marked B.) or their associates, or any other person or persons whomsoever, the right, liberty, or privilege of laying a double, or any track for a railway in the street known as Broadway, in said City of New-York, from the South Ferry to Fifty-seventh street, or any railway whatsoever in said Broadway; and from 408 breaking or removing the pavement in said street, or in any other manner obstructing said street preparatory to, or for the purpose of laying or establishing any railway therein, until the further order of this *court* in the premises.

And that the defendants show cause, at a Special Term of this court, to be held at the City Hall, in the City of New-York, on the second Monday of January, 1853, at the opening of the court on that day, or as soon thereafter as counsel can be heard, why this injunction order should not be made 409 perpetual.

Dated New-York, Dec. 27th, 1852.

WILLIAM W. CAMPBELL.

## B.

*Resolved*, That Jacob Sharp, Freeman Campbell, William B. Reynolds, James Gaunt, I. Newton Squire, Wm. A. Mead, David Woods, John L. O'Sullivan, Wm. M. Pullis, Jonathan Roe, John W. Hawkes, James W. Faulkner, Henry Dubois, John J. Hollister, Preston Sheldon, John Anderson, John R. Flanagan, Sargent V. Bagley, Peter B. Sweeny, Charles B. White, James W. Foshay, Robert E. *Ring*, Thomas Ladd, Conklin Sharp, Samuel L. Titus, Alfred Martin, D. R. Martin, William Menzies, Charles H. Glover, Gershon Cohen, and 410 those who may for the time being be associated with them, all of whom are herein designated as associates of the Broadway railway, have the authority and consent of the Common Council to lay a double track for a railway in Broadway and Whitehall or State street, from the South Ferry to Fifty-ninth street; and also, hereafter, to continue the same, from time to time, along the Bloomingdale road to Manhattanville, which continuation they shall be required, *from* time to time to make, whenever directed by the Common Council, the said grant of permission and authority being upon and with the following conditions and stipulations, to wit,

*First*. Such tracks shall be laid under the direction of the 411 Street Commissioner, in or near the middle of the street, the outer rails not exceeding twelve feet six inches apart, and the rails being laid flush and even with the pavement, the inner portion of the rail being of equal height with the outer, with grooves not exceeding one inch in width, or such other rails as shall be *approved* by the Street Commissioner or the Common Council, *on* such grades as are now established, or may hereafter be established, by the Common Council; and the said associates shall keep in good repair the space between

the said rails, and one foot on each side; and no motive power, excepting horses, shall be used below Fifty-ninth street.

*Second.* The said associates shall place new cars on said rail road, with all the modern improvements, for the convenience and comfort of passengers. And they shall run cars thereon, every day, both ways, as often as the public convenience may require, under such direction as the Common Council may, from *time* to time, prescribe. Said cars, with horses attached, not to exceed forty-five feet in length.

*Third.* The said associates shall, in all respects, comply with the directions of the Common Council in the building of such railway, and in the running of the cars thereon.

*Fourth.* At the Bowling Green, the said associates may divide the two tracks aforesaid, running one of them down Whitehall street, and the other down State street, should they deem such division necessary; and also, whenever in the course of their route the *said* road shall pass a public square, it may be carried with a single track, round both sides of said square, instead of only one, for the better accommodation of the public on both sides thereof.

*Fifth.* The said associates shall be required to procure a depot, at some place near or at the lower part of said route, for the purpose of keeping withdrawn from Broadway such proportion of the cars coming down in the morning as shall not be required for the accommodation of the return travel until the afternoon; and also, they shall be required to stop

a portion of the cars at the Park, and to send *down* below that point no greater proportion of the whole number employed, than shall be found by experience to be requisite for 415 the accommodation of the travel below that point, subject to regulation by the Common Council.

*Sixth.* The cars shall be so constructed as not to make provision intended for standing passengers to crowd upon the seated passengers; and also, when all the seats are full, the cars shall not be stopped to take in more passengers to be crowded into the said *seats*; a flag being displayed in front of the car to give notice that all the seats are full.

*Seventh.* The said cars shall not be allowed to stop, so as to obstruct a crossing, nor to stop more frequently in a block 416 (unless the same be of extraordinary length) than just beyond its first crossing, except in rainy weather.

*Eighth.* The said associates shall keep an attendant, distinguishable by some conspicuous mark or badge, at every such appointed stopping place, in all parts of the street usually much crowded with vehicles, whose duty it shall be, with attention and respect, to help in and out of the cars all passengers who may desire such assistance, and in general to watch over the safety of passengers from all dangers of passing vehicles.

417 *Ninth.* The said associates shall be required to keep, or cause to be kept in readiness, a number of sleighs adequate to the public accommodation, when the travel of the cars may be obstructed by snow.

*Tenth.* The said associates shall cause the said street to be well swept and cleaned every morning, and the sweepings carried away, before eight o'clock in summer, and *nine* o'clock in winter, except Sundays; this provision applying to the whole of the *street* south of Fourteenth-street, above which point the same shall be done as often as twice a week when the weather will permit.

*Eleventh.* No higher rate of fare shall be charged for the 418 conveyance of passengers from any one point to any other point along said route, and such combined system of routes as may hereafter be adopted by means of cars and transverse omnibuses, than five cents for each passenger.

*Twelfth.* In consideration of the good and faithful performance of all these *conditions*, stipulations and requirements, and of such other requirements as may hereafter be made by the Common Council, for the regulation of the said railway, as aforesaid, the said associates shall pay, for ten years from the date of opening the said railway, the annual license fee 419 for each car now allowed by law, and shall have a license accordingly; and after that period, shall pay such amount of license fee, for further licenses, as the Corporation, with permission of the Legislature, shall then prescribe; or, in default of consenting thereto, shall surrender *the* road, with all the equipments and appurtenances thereto belonging, to the said Corporation, at a fair and just valuation of the same.

*Thirteenth.* Within a reasonable time after the passing of this resolution, the said associates, or a majority in interest thereof, shall form themselves into a joint stock association,

420 which association shall be vested with all the rights and privileges hereby granted, and shall have power, by the votes of at least a majority in interest of the associates, to frame and establish articles of association and by-laws, providing for the construction, operation, and management of the *said* railway, the mode of admitting new associates, and of transferring the shares or interests of any of the associates to new associates or assigns, the number, duties, mode of appointment, tenure, and compensation of officers, the manner of making contracts,

421 amending the by-laws, and calling in assessments from the associates, and generally the means and mode of establishing the railway and carrying it on, and of controlling and managing the property and affairs of the said association.

*Fourteenth.* The association shall not be deemed dissolved by the death or act of any associate, but his successor in *interest* shall stand in his place; and the rights of each associate shall depend on his own fulfilment of the conditions imposed on him by these restrictions, or the articles of association and by-laws of the association; and in case of his failure to fulfil 422 the same, after twenty days' notice in writing to him so to do, his rights shall be forfeited to and devolve upon the remaining associates. And said associates may, at any time, incorporate themselves under the general Rail Road Act, whenever two-thirds in interest of the associates shall require it.

*Fifteenth.* The associates, *whose* names are set forth in this resolution, shall by writing, filed with the Clerk of the Common Council, signify their acceptance thereof, and *agree* to conform thereto; and all new associates or assigns, duly admitted according to the provisions of the articles of association, and by-laws, shall be deemed parties to such agreement.

## C.

"Whereas, the Honorable William W. Campbell, one of the Judges of the Superior Court, has, without color of law or justification, assumed the prerogative of directing and controlling the municipal legislation of this city, by issuing an injunction, prohibiting the Mayor, Aldermen and Commonalty of the City of New-York from performing a legislative act, supposed by him to be probably about to be performed, and summoning the said Mayor, Aldermen and Commonalty to appear before him, and show cause why the said injunction should not be *perpetual*. And whereas, the said injunction, 424 issued at the close of a session, and throwing forward the period of such showing of cause beyond the expiration of the session, in regard to a measure which has been pending for months, bears on its face a character of indirection not less unjustifiable, and not less unworthy of the judiciary, than the usurpation of authority and jurisdiction which is contained in such an attempted injunction itself. And whereas, if the legislative act in question should prove, on judicial investigation, to be open to any objection of illegality or unconstitutionality, *there* would always exist ample opportunity for restraining its execution by injunction upon the first proceedings of the parties authorized to carry the same into effect. And whereas, if such a precedent of unwarranted and unwarrantable interference with the rightful functions, powers, and duties of a legislative body, attempted by a judge, be submitted to or tolerated without just rebuke, not only will the whole municipal legislation of this city, with its half million of inhabitants, be subjected to the caprice or interested views 425

of any judge who might be found willing to come forward  
426 with *attempted* vetoes, in the form of injunctions, but the next natural step of judicial usurpation will be to arrest and veto, in similar manner, the legislation of the State, or that of Congress, on any judge's opinion of constitutionality, expediency, or motive, at the close of a session, when all business of importance is usually completed. And whereas, the reasons alleged therefor are equally untenable in law, and unfounded in facts :

Therefore,

*Resolved*, That as this Common Council will not encroach on the lawful jurisdiction and powers of any other public  
427 authority or body, so also *will* it never allow any other to interfere unlawfully with its own, which it holds from the people, and which it is bound to exercise according to its own judgment, and on its own responsibility, and not according to the views and directions of any judge or other individual citizen ; and that it is the duty of the Common Council on this unprecedented occasion, to protect its own dignity, and the rights of the people of the city of New-York and its constituency, by utterly disregarding the said injunction upon its  
428 legislative action, and declaring its sense upon the *same*.

*Resolved*, That the Common Council have an equal authority and right to suspect and impute improper motives to any intended judicial decision of any Judge; and consequently to attempt to arrest his action on the Bench, as such Judge has, in regard to the legislative action of the Common Council.

*Resolved*, That in reference to the measure against which the injunction in question is directed, it was adopted by the Common Council on grounds of public expediency, justice and right, for the best good of the city, both in regard to the accommodation and service of the public, and in *regard* to the 429 interest of the city treasury, and also on petitions from more than thirty thousand citizens ; and that nothing has yet appeared which shakes the ground on which it was so adopted, and that we shrink from no discussion, or investigation, judicial or otherwise, into the foundations of these grounds, and the reasons of our action, collective, or individual."

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## SUPERIOR COURT.

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The People of the State of New-York, on  
 the relation of Thomas E. Davis and  
 Courtlandt Palmer,  
*against*  
 Oscar W. Sturtevant.

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The answer of Oscar W. Sturtevant, to the interrogatories filed against him in this *proceeding*.

430

**FIRST.**—To the first interrogatory, he saith—That he was, during the last year, and is now an Alderman of the City of New-York, for the Third Ward.

SECOND.—To the second interrogatory, he saith—That on the 29th day of December, 1852, while he was about entering the chamber of the Board of Aldermen, at their evening session, a paper was put into his hands, which, he afterwards found to be a copy of the injunction mentioned in the interrogatories; but that the original injunction was not shown to him, nor was *the* copy which was so put into his hands read by him, until after the session of the Board that evening had closed; and no papers in the action in which the injunction was issued, other than a copy of the summons and a copy of the injunction was ever served on him, or shown to him, or seen by him, until he received a copy of the order to show cause why the attachment should not issue against him.

THIRD.—To the third interrogatory he saith—That he was present at the meeting of the Board of Aldermen, on the 29th day of said December, when a majority of all the members elected to the said Board, appeared and passed the resolution. A copy of which is annexed to the interrogatories, notwithstanding the objections of the Mayor.

FOURTH.—To the fourth interrogatory he saith, that he did at such meeting, and after the delivery to him of the copy of injunction as above stated, call for the re-consideration of the said resolution, and upon such re-consideration voted in favor of the said resolution; that, in calling for the re-consideration of the resolution and voting for it when *re-considered*, he acted in the performance of what he believed to be his duty, enjoined by the law of the land and sanctioned by his oath; that the Common Council was to expire on the

3d day of January, 1853; that the re-consideration was in order on the 29th of December, 1852, and it was called up in the ordinary and regular course of business in the Board; that the President of the Board, thereupon, in the common course of his duty as presiding officer of the Board, presented the said resolution *for* the legislative action of the Board, and 434 declared the question to be on passing the same, notwithstanding the objections of the Mayor; that the President then directed the question to be taken by ayes and noes, and ordered the Clerk to call the roll: and thereupon the Clerk called the roll of members, and as the name of this respondent was called, he did, in the performance of his legislative and public duty, as a member of the said Board, vote upon the said resolution, according to his best judgment and conscience; and that thus calling for the re-consideration and *voting* aye, 435 were the only acts done by him towards the passage of the said resolution after the delivery to him of the said copy of injunction.

**FIFTH.**—To the fifth interrogatory he saith, that he excepts to the same, and to all the allegations relating to the same matter prefixed to the interrogatories, and insists that he is not bound to make any answers thereto, and that they should be expunged.

**SIXTH.**—To the sixth interrogatory, he saith, that he excepts to the same, and to all the allegations relating to the same matter prefixed to the interrogatories, and *insists* that he is 436 not bound to make any answer thereto, and that they should be expunged.

SEVENTH—To the seventh interrogatory, he saith, that he believes, though he has no personal knowledge of the fact, that the said resolution of the Common Council was sent to the Board of Assistant Aldermen, and on the thirtieth of said December, passed by the votes of a majority of all the members elected to such board; but that this respondent had no agency in sending it to the Board of Assistants, or procuring its passage there.

437 And this respondent doth *now* deny and protest against the jurisdiction of this court to issue the injunction, or to prevent his voting in the discharge of his legislative duty, or to call him to account for his vote upon the said resolution. And in answering these interrogatories, he does not waive any exceptions to the jurisdiction of the court, but denies that he can be held answerable to this court for any vote or act mentioned in these answers.

OSCAR W. STURTEVANT.

*City and County of New-York.*

OSCAR W. STURTEVANT, being sworn, saith, that the foregoing answers are true to the *best* of his knowledge and belief.

OSCAR W. STURTEVANT.

Sworn, this 23d day of Feb. 1853, before me,  
JOHN PHILLIPS, Com. of Deeds.

At a Special Term of the Superior Court, held  
at the City Hall, in the City of New-  
York, on the 1st day of March, 1853.

PRESENT, DUER, *Justice.*

BOSWORTH and EMMET, *Associates.*

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THE PEOPLE, ex rel. &c.  
against  
OSCAR W. STURTEVANT.

}

Ordered, after hearing counsel on both sides, that the said Sturtevant answer the 5th and 6th interrogatories.

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SUPERIOR COURT OF THE CITY OF NEW-YORK.

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The People of the State of New-York, on  
the relation of Thomas E. Davis and  
Courtlandt Palmer,  
against  
Oscar W. Sturtevant.

439

The answer of Oscar W. Sturtevant  
to the fifth interrogatory filed against  
him in this proceeding.

FIFTH—To the fifth interrogatory he saith, that he did at such meeting, and immediately after the adoption of the said

resolution, move the adoption of the preamble and resolutions, of which a copy marked C. is annexed to the complaint.

That in making that motion, his only motive was to vindicate the dignity and assert the rights of the Common Council 440 of the City of New-York, *and* of their whole constituency ; which dignity and rights he believed to be unjustly and illegally assailed by the injunction and complaint on which it was founded, of a portion of the contents of which he had heard through public rumor. That the motives of the members of the Common Council were aspersed, and their self-respect wounded by the charges of the said complaint ; and that the circumstances under which the injunction was obtained and served, were highly irritating.

The resolution had been pending nearly two months ; the 441 chambers of the Judges were within a few rods of the *chambers* of the Common Council and the Mayor's and other public offices of the city, and in the same building with the office of the Corporation Counsel. There had been ample opportunity to apply for the injunction before, and even at the time when it was applied for, there was time enough for notice to the corporation, and hearing them, before granting the injunction ; that the Common Council was to expire on the 3d January, 1853 ; and when the respondent heard that an injunction had been granted without notice, and continued beyond the time 442 when the Common Council *was* to expire, and requiring the defendants, as if in mockery, to show cause against it, on the 12th of January, he believed that it was a device of the opponents of the road to defeat the resolution by indirection, and virtually, get the case decided without a trial.

This respondent also believed, as he still believes, that the Court had no jurisdiction to grant the injunction ; and knowing that it is the right of every citizen to question and defy the exercise of illegal power, he did under the influence of all these considerations, move and vote for *the* said resolutions ; 443 but, in doing so, he did by no means intend any disrespect to Judge Campbell or to question the exercise of any rightful power, or offer any resistance to the law, or any contempt to the lawful authority of the Court.

SIXTH.—In answer to the sixth interrogatory he saith, that the said preamble and resolutions were adopted by the Board of Aldermen.

OSCAR W. STURTEVANT.

*City and County of New-York.*

OSCAR W. STURTEVANT being sworn, saith that the foregoing answers are true to the best of his knowledge and belief.

OSCAR W. STURTEVANT.

Sworn, this 23d day of Feb. 1853, before me,

JOHN PHILLIPS, Com. of Deeds.

444

## NEW-YORK SUPERIOR COURT.

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The People of the State of New-York, *ex rel* }  
 Thomas E. Davis and Courtlandt Palmer, }  
 against }  
 Oscar W. Sturtevant.

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*City and County of New-York: ss.*

Henry Hilton, of said City, being duly sworn, says, that he was present on the 29th day of December, 1852, when Malcolm Campbell served on the said Oscar W. Sturtevant, the injunction in the suit of Thomas E. Davis and Courtlandt Palmer, against the Mayor, Aldermen and Commonalty of the City of New-York. That such service was made by delivering to said Sturtevant a *copy* of said injunction, and at the same time showing to him the original injunction order; said Sturtevant being at the time in one of the rooms, on the first floor of the City Hall, adjoining the office of the Clerk of the Common Council. That said injunction was served on said Sturtevant a considerable time previous to the Session of the Board of Aldermen on that evening, and that no action was had in said Board of Aldermen in relation to the subject of the Broadway Rail Road, until, at least, one hour after 445 the service of said injunction on *said* Sturtevant.  
 446

HENRY HILTON.

Sworn before me, this 26th day of }  
 February, A. D. 1853, }

CHARLES FRAZER, *Commissioners of Deeds.*

## NEW-YORK SUPERIOR COURT.

The People of the State of New-York, ex rel. }  
 Thomas E. Davis and Courtlandt Palmer, }  
 v. }  
 Oscar W. Sturtevant. }

*Special Term, March 5th, 1853.*

PRESENT—HON. JOHN DUER, *Justice.*

An attachment for an alleged contempt, in violating an injunction issued in the suit in this court, of Thomas E. Davis and Courtlandt Palmer, against the Mayor, Aldermen and Commonalty of the City of New-York, having been issued and *returned*, and counsel for both parties having been heard; 447

And it is thereupon ordered, that it be referred to William Kent, Esq. to hear and report what are the costs and expenses, including the expenses of this reference of the said Palmer and Davis in this matter, including therein reasonable counsel fees.

And it is further ordered, that the parties appear before said referee, on the seventh day of March, instant, at three o'clock, P. M. without further notice, and that the referee make his report to this court on Thursday morning next, at eleven o'clock, and the parties then *appear* by their counsel, 448 to make any objections to the said report; to the end, that the court may, on Saturday next, proceed to pronounce their final judgment in this matter.

Enter the above. J. DUER.

## THE SUPERIOR COURT OF THE CITY OF NEW-YORK.

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The People of the State of New-York, *ex rel* }  
 Thomas E. Davis and Courtlandt Palmer, }  
 against }  
 Oscar W. Sturtevaut. }  


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*To the Justices of the Superior Court  
 of the City of New-York.*

449 The undersigned, a referee appointed by an order of this court, in the above entitled cause, entered on the fifth day of March instant, to *report* what are the costs and expenses of the relators, Davis and Palmer in this matter, including the expenses of the reference and reasonable counsel fees in this matter.

Respectfully report, that the attorneys and counsel of the relators have appeared before him and the counsel of the defendant, and that he has taken testimony in relation to the matters referred, and heard the arguments of counsel thereon.

450 That in making this report, he has taken into consideration the pendency of twenty-six other cases, in which motions for attachments have been made, and subsequent proceedings have been had, similar to the motions and proceedings in this case, the questions of law being essentially the same in all, and the arguments on which these questions were decided having been made in this case. The referee, therefore, has

proceeded on the principle of ascertaining the aggregate amount of costs and expenses, and counsel fees in all the cases, and of assigning to each case an equal and proportionate share of this aggregate amount.

The referee finds, that the Relators have incurred the following expenses, which should be re-imbursed to them, viz:

Sheriff's fees in the 27 cases, being	\$. 18 63
Printing expenses, for printing the various documents required for the use of the Court, and in the course of the legal proceedings,	451 132 15
He further finds, that the costs of the plaintiffs, legally taxable in the 27 cases, amount to five hundred and forty dollars, being twenty dollars in each suit.	540 00

In inquiring as to the amount of reasonable Counsel fees, to be reported to the Court, in pursuance of this order, the Referee has experienced a difficulty in passing upon services to which no precise standard of value *can* be applied, and 452 which can only be imperfectly exhibited to him by testimony. The sum which is reported below, is much less than was claimed on behalf of the relators for their Counsel, and less, it was testified, than the Relators were prepared to pay. In discharging to the best of his discretion the duty of fixing the amount of the Counsel fees, the Referee states he has *not* adopted the Counsel fees, which as between counsel and client would probably be freely paid, but that which considering the important character of the proceedings before the Court and *the* elaborate argument of the Counsel, he has endeavoured to ascertain the amount of such Counsel fees, as it would be reasonable to report, in an adversary proceeding between plaintiff and defendant.

The number of the Counsel employed by the Relators was proved before him ; and it was conceded that the labors and occupation of time had not been equally born by the gentlemen who acted as Counsel. The Referee does not feel himself called upon by the order, to enter further on this subject, nor to make any distinction in the fees of the Counsel.

454 He reports as, in *his* opinion, reasonable Counsel fees in the twenty-seven cases, the aggregate sum of two thousand dollars [\$2,000.]

The Referee further reports the expenses of the reference in the twenty-seven cases, to be fifty dollars.

The Referee further reports that the sum of sixty-nine cents is an additional Sheriff's fee against the Defendant, Oscar W. Sturtevant.

The items above mentioned of costs, expenses and Counsel fees computed together, form the sum of two thousand seven hundred and forty dollars, and seventy-eight cents, which, divided equally among the twenty-seven cases, make the sum 455 of *one* hundred and one dollars and fifty-one cents applicable to each case.

To the last mentioned sum must be added, in the present case, the Sheriff's fee of sixty-nine cents.

The Referee, therefore, reports, as the costs and expenses in this matter, including the expenses of this reference and

reasonable Counsel fees, the sum of one hundred and two dollars and twenty cents.

All of which is respectfully submitted.

WILLIAM KENT.

Referee.

NEW-YORK, March 8th, 1853.

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At a Special Term of the Superior Court of  
the City of New-York, held at the  
City Hall, *in* said city, on the 12th 456  
day of March, 1853.

PRESENT, HON. JOHN DUER, *Justice.*

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The People of the State of New-York, ex  
rel. Thomas E. Davis and Courtlandt  
Palmer, }  
*against*  
Oscar W. Sturtevant. }

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A writ of attachment having heretofore issued out of and under the seal of this court, directed to the Sheriff of the City and County of New-York, against the above named Oscar W. Sturtevant, for contempt in disobeying an injunction granted in the action pending in this court, of Thomas E. Davis and

457 Courtlandt Palmer, as plaintiff, against the Mayor, *Aldermen* and Commonalty of the City of New-York, as defendants; and the said Sturtevant having been, by virtue of said attachment attached by said Sheriff, and having personally appeared in court; and interrogatories, specifying the facts and circumstances alleged against said Sturtevant, having, by order of this court, been filed, and a copy thereof served on said Sturtevant; and he having been required to answer, and having answered the same; and several affidavits and papers touching the said contempt having been produced and read; and counsel, as well for the said relators as the said Oscar W. 458 Sturtevant, having *been* read, and mature deliberation being thereupon had:

It is now here considered and adjudged that the said Oscar W. Sturtevant has been and is guilty of the misconduct alleged against him in the proceedings, and that such misconduct was calculated to, and actually did defeat, impair, impede and prejudice the rights and remedies of the said plaintiffs, Thomas E. Davis and Courtlandt Palmer, in their said action against the Mayor, Aldermen and Commonalty of the city of New-York, and that the said Davis and Palmer have, by reason of the said misconduct been put to a large *amount* of costs and expenses, to wit, the sum of one hundred and two dollars and twenty cents.

458 And it is further considered and adjudged, that the said Oscar W. Sturtevant for his said misconduct be imprisoned in the common jail of the City and County of New-York, for the period of fifteen days; and further, that a fine of three hundred

and fifty-two dollars and twenty cents be, and the same is hereby imposed upon the said Oscar W. Sturtevant, for his said misconduct, and that he stand committed to the common jail of the *City* and County of New-York until the said fine 460 be paid.

And it is further considered and adjudged, that the sum of one hundred and two dollars and twenty cents, part of the said fine, be paid over to the said Davis and Palmer, or their attorneys, to satisfy their said costs and expenses in the premises; and that the residue of the said fine be paid to the Clerk of this Court, to be disposed of according to law, and that a warrant issue to carry this judgment into effect.

## SUPERIOR COURT OF THE CITY OF NEW-YORK.

461 The People of *the State of New-York*,  
 on the relation of Thomas E. Davis  
 and Courtlandt Palmer,  
*against*  
 Oscar W. Sturtevant.

Take Notice, that the above-named, Oscar W. Sturtevant,  
 hereby appeals to the General Term of this Court from the  
 final order or judgment, entered in this proceeding, at the  
 Special Term of this Court, on the 12th day of March, 1853.

Dated New-York, March 12th, 1853.

Yours, &c. OSCAR W. STURTEVANT.

To  
 462 R. G. CAMPBELL, Esq., *Clerk of the Court; and*  
*McMURRAY & HILTON, Esqrs., Plaintiffs' Attorneys.*

At a General Term of the Superior Court,  
of the City of New-York, held at the  
City Hall, in said City, on the 12th  
day of March, 1853.

*Present*—JOHN DUER, JOSEPH S. BOSWORTH, and ROBERT  
EMMETT, *Justices.*

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The People of the State of New-York,  
ex. rel. Thomas E. Davis, and Courtlandt  
Palmer,

*against*

Oscar W. Sturtevant.

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An Appeal having been taken, by the defendant to the General Term of this Court from the Judgment or order, this day made, by the Special Term of said Court, adjudging the said defendant to *be* guilty of a contempt, and directing the 463 punishment thereof, and a motion having been thereupon made, by the said relators, to dismiss the said appeal, on the ground that no appeal would lie in such a case, and counsel for both parties having been heard on that question,

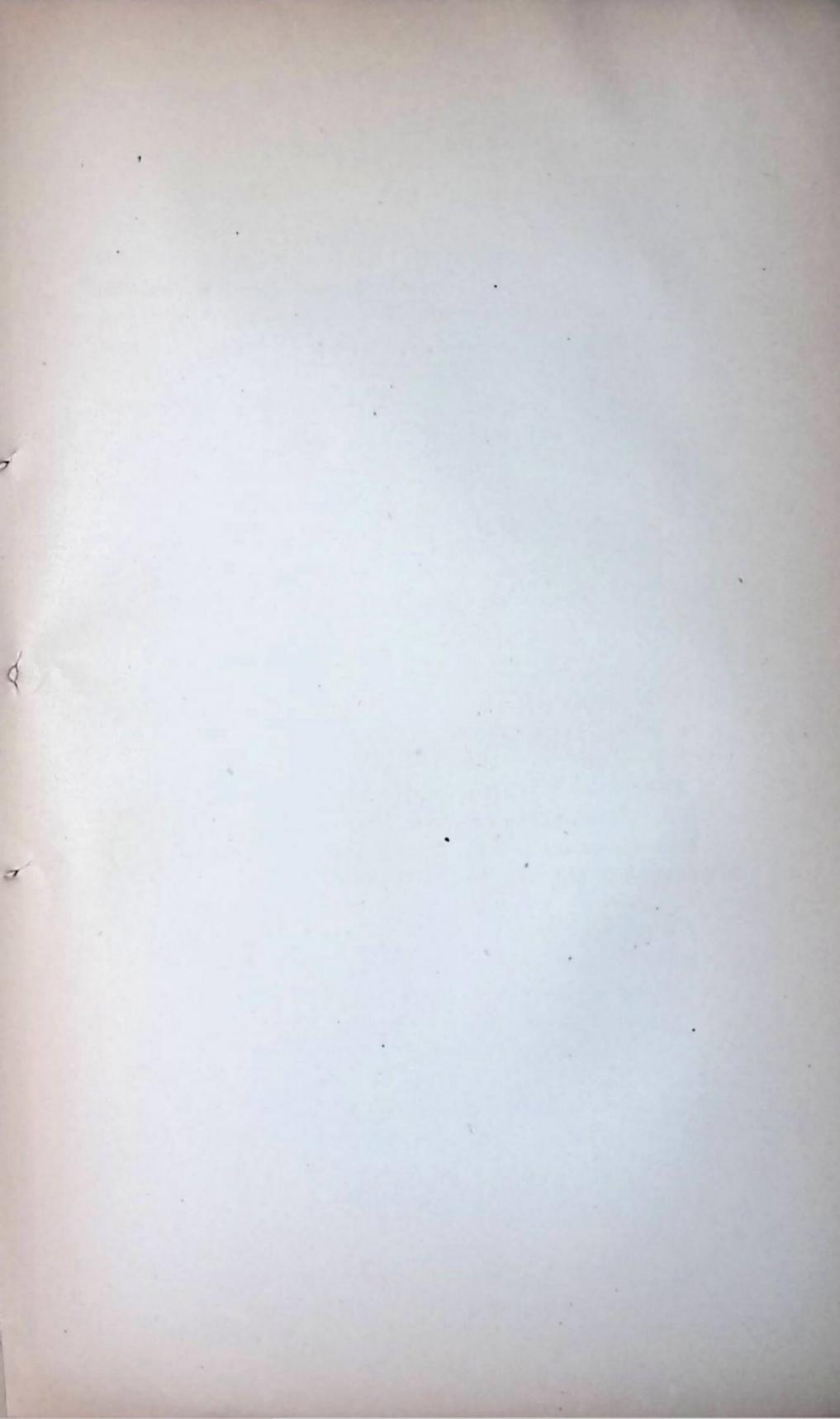
It is thereupon ordered that the said motion be denied.

At a general term of the Superior Court of the  
 City of New-York, held at the City  
 Hall, in said city, on the 12th day of  
 March, 1853.

Present—JOHN DUER, JOSEPH S. BOSWORTH,  
 464 and ROBERT EMMET, *Justices.*

The People of the State of New-York, ex  
 rel. Thomas E. Davis and Courtlandt  
 Palmer, }  
 against  
 Oscar W. Sturtevant. }

The appeal by the defendant from the judgment or order of  
 the special term of this court, adjudging the defendant to be  
 in contempt, and directing the punishment thereof, having  
 been brought on at a hearing, and counsel for both parties  
 having been heard, and mature deliberation been thereupon  
 had, it is now here considered and adjudged, that the said  
 judgment or order of the Special Term be, and the same is,  
 465 in all things *affirmed.*





## NEW-YORK SUPERIOR COURT.

SPECIAL TERM, February 5th, 1853.

Before Hon. JOHN DUER, Justice;

CAMPBELL, BOSWORTH and EMMET, J. J.  
associated with him on the argument.

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Thomas E. Davis and Courtlandt Palmer,	vs.
The Mayor, Aldermen and Commonalty of the City of New-York.	

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## OPINION BY DUER, J.

A motion has been made in this case for an attachment against Oscar W. Sturtevant, one of the Aldermen of this 467 city, for an alleged contempt of the authority of this Court, by an act of positive disobedience to its lawful process.

The material facts that have given rise to the motion, and upon which its determination, in a measure, rests, I shall endeavor to state in a few words.

On the 27th of December last, the plaintiffs, in their own right, and on behalf of all others, the tax-paying inhabitants of this city, exhibited their complaint, duly verified, to our Associate, Justice Campbell; who, on the same day, in con- 468

formity to the prayer of the complaint, and holding that the matters set forth therein entitled the plaintiffs to the relief demanded, granted an order of injunction, commanding and enjoining *inter alia* that the defendants, the Mayor, Aldermen and Commonalty of the City, and each of them, should absolutely desist and refrain from granting to, or in any manner authorising Jacob Sharp and others, (the persons named in a resolution, of which a copy was annexed to the complaint,) or 469 any other person or persons, the right, liberty or privilege of laying a double or any track for a railway in the street known as Broadway, in this city, from the South Ferry to Fifty-ninth street, or any railway whatever.

The resolution of the Common Council, to which the complaint and injunction refer, is upon its face, not only by its manifest intent, but by its express words, a grant of permission or authority upon certain conditions and stipulations, to Jacob Sharp and other persons named as his associates, to lay 470 a double track for a railway in Broadway and Whitehall or State street, from the South Ferry to Fifty-ninth street ; and to render the resolution, when finally adopted, effectual as a grant, nothing more was required than that the persons named as associates should, by a writing to be filed with the Clerk of the Common Council, signify their acceptance. The complaint alleged that the resolution had, before that time, been adopted by each Board of the Common Council, and had been returned by the Mayor, with his objections, to the Board of 471 Aldermen, in which it originated ; and averred that those members of each Board, (constituting in each a majority of those elected,) by whose votes the resolution had originally passed, had given out and declared that they intended again

to pass the same, notwithstanding the objections of the Mayor ; and that the grantees named in the resolution had also made known their intention to file their written acceptance immediately upon its adoption.

The actual conduct of the parties corresponds with these anticipations.

472

On the 28th of December, the order of injunction, together with a copy of the summons and complaint, was duly served upon the Mayor ; and upon the same or the following day, the injunction, with a copy of the summons, was served upon each member of the Board of Aldermen.

On the evening of the 29th of December, the Board of Aldermen met, and the resolution making the grant to Sharp and his associates, being brought forward for re-consideration, it was again passed—the Alderman now before us and twelve 473 of his associates voting for its adoption. And, in order, it would seem, that no doubt might remain as to the nature and motives of their action, the majority of the Board, upon the same evening, and upon the motion of Alderman Sturtevant, adopted certain resolutions, which are set forth at large in the papers before us, but which we deem it unnecessary now to recite.

It is sufficient to say, that one of these resolutions declared that it was the duty of the Common Council to protect its own 474 dignity and the rights of its constituents, the people of the city, “ by utterly disregarding the injunction upon its legislative action, and declaring their sense of the same ; and that

a preamble to the resolutions which was adopted with them, declared their sense of the injunction, by denouncing it in no measured terms, as an attempt, without color of law or justification, to direct and control the municipal legislation of the city, as bearing upon its face a character of indirection not 475 less unjustifiable and not less unworthy the judiciary than its usurpation of authority and jurisdiction, and as a precedent of an unwarranted and unwarrantable interference with the rightful functions, powers and duties of a legislative body.

The original resolution or grant, and the additional resolutions vindicating the rights and dignity of the Common Council, were transmitted to the Board of Assistant Aldermen ; and on the evening of the 30th of December, the original resolution was adopted by that body ; but whether any action was then 476 or has since been taken on the additional resolutions, does not appear. On the same evening, the associates named in the original resolution, by a writing signed by them all, and filed with the Clerk of the Common Council, signified their acceptance of the resolution, and their agreement to conform thereto ; and thus, if these proceedings were valid, the grant, which the order of injunction prohibited the defendants from making, became absolute, and the grantees acquired the very right, liberty and privilege of laying a track for a railway in Broad- 477 way, which the injunction, by express words, had strictly commanded should not be given.

It follows from the statement that has now been made, that a majority of the members of the present Board of Aldermen have deliberately chosen to place themselves towards this Court and its proceedings, (for the act of the Judge who issued

the injunction, is that of the Court—*Code*, § 218,) in a relation of direct and open hostility. Admitting their own knowledge of the order of injunction, and of the reasons upon which it was founded—reasons which they have declared to be untenable in law and unfounded in fact—construing the order as commanding them to desist and refrain from the performance of the act which they were determined to perform, and have performed—they have chosen to treat it as an illegal assumption of authority, an exercise of power without right, which their duties to themselves and to their constituents required them to disregard and resist. Relying on their own knowledge and convictions, not only of their own duties and powers, but of the duties and powers of the judiciary of the State, they have publicly raised an issue which this Court is compelled to meet, 479 and bound to determine. That issue is, whether this Court, by an unprecedented stretch of judicial authority, has invaded the province and violated the rights of the Common Council as a legislative body, or those members of that body, who openly denied and boldly disregarded the authority of this Court, are guilty of the criminal disobedience with which they are charged, and we are now called upon to punish.

The questions, therefore, which this motion involves, possess no ordinary interest. It is felt by all, that they are in no ordinary degree grave and delicate. With a just sense of their 480 importance, they have been elaborately argued by the counsel of the parties, and have been carefully and anxiously considered by ourselves. For obvious reasons, it would be desirable, were it possible, that these questions should be determined by another tribunal; but as no such transfer can be made of our

jurisdiction, we must not and will not shrink from the responsibility which the law imposes.

481 If the injunction that has been issued, was indeed an unjustifiable excess of jurisdiction—an unprecedented act of judicial power—it will be our duty to confess, and with all possible expedition, correct the error ; but if the lawful mandate of this Court, issued in the exercise of its known jurisdiction, has been publicly denounced and wholly disregarded by those to whom it was directed, and who were, from their official position, under a peculiar obligation to respect and obey it ; we should indeed be unworthy of our station, could we hesitate to  
 482 maintain firmly the rights of the judiciary, and vindicate effectually the insulted, but, we trust, still paramount authority of the law.

We proceed to the immediate consideration of the questions that have been discussed.

It has been contended, that Alderman Sturtevant is not liable to an attachment for the contempt with which he is charged, for the following reasons :

First, because he is not a party to the suit ; and the law is  
 483 settled, that it is only a party against whom relief is sought and may be given, who is bound by an injunction.

Second, because the service of the injunction upon him, was irregular and void, not being accompanied by the service of a copy of the affidavit ; the verified complaint upon which it was founded.

Third, because the only breach of the injunction with which he is charged, consists in the act of voting for the resolution to which it refers; an act to which the terms of the injunction do not apply, and which they were not intended to restrain. 484

And lastly, because if the injunction must be construed as intended to restrain the re-consideration and adoption by the Common Council of the resolution in question, the prohibition, as illegal and void, was properly disregarded; no court of law or equity having any jurisdiction to control, in any case or for any reasons, the legislative action of a corporate, and more especially, of a municipal body.

These objections will be considered in the order in which they have been stated.

485

The first, that Mr. Sturtevant is not a party to the suit, and, therefore, was not bound to obey the injunction; we are all of opinion, cannot be sustained.

It is unnecessary now to determine the question, whether, under the provisions of the code, (section 219,) a person to whom an injunction is directed, is wholly excused from obedience, unless he is a party to the suit, and one of those against whom relief is demanded. It will be time enough to consider and decide this question, (which is, perhaps, more doubtful than it seems to have been regarded,) when it shall properly arise in a case before us. It does not arise in the case now before us, for the plain reason, that Mr. Sturtevant is, in judgment of law, a party to the suit. He is not, indeed, a party in his proper name, or as a mere individual; but he is so in his

official character, and it is his personal action in that character that the injunction, not only by its legal construction, but by its express words, seeks to restrain. It is not addressed to the Mayor, Aldermen and Commonalty of the City, as an abstract metaphysical being, but it is addressed to each individual member of the whole corporate body ; and it controls the personal action of every one of them whose consent or co-operation might be necessary to the completion of the corporate act which it strictly prohibits. It imposes a command and duty upon every one of them to refrain absolutely from performing or concurring in the performance of the prohibited act, for the very purpose, and as the necessary means of preventing it from becoming an act of the corporation. It is not true, as the objection we are considering plainly assumes, that when a judicial command in relation to a corporate act, a mandamus or injunction is directed to a corporation solely by its corporate name, the members and officers through whom alone the corporation can act, may disregard it with entire impunity ; and by their disobedience, render the process of the court wholly ineffectual. The law, we apprehend, is otherwise settled. That the mandate of the court in these cases may, with entire propriety, be directed exclusively to the corporate body by its corporate name has not been denied ; and there are numerous decisions that show that when such is the form of the order or writ, it is operative and binding not only upon the corporation itself, but upon every person whose personal action as a member or officer of the corporate body it seeks to restrain or control. Every such person is as fully bound to personal obedience, as if personally named in the process, and consequently is just as liable for his disobedience. (*Rex vs Mayor of Abingdon*, 1 *Lord Raymond*, 560 ; *Rex vs. Mayor*

of *Shelford*, 2 *Cases in Chan.* 171-2; *Lord Raymond*, 848; 490  
*Rex vs. Mayor of Tregony*, 8 *Mod.* 111; *Bank Commissioner vs. City Bank of Rochester*, 1 *Barb. ch. p.* 636.) We understood the learned counsel for the defendants to admit that in the case of a mandamus, the law is such as we have stated, and we are clear in the opinion, that in respect to the persons upon whom it operates, there can be no distinction between a mandamus and an injunction. Indeed, all the decisions rest upon the same principle, a principle which *Lord Kenyon*, in the case of *Rex vs. Holland*, has briefly and forcibly stated. 491  
(5 *Term R.* 622.) It is that, where "a duty is thrown upon a body consisting of several persons, each is individually responsible for its performance, and individually liable for its breach;" and in the application of this principle, it is plainly immaterial, whether the duty result from an act of the Legislature, or the mandate of a court of justice.

We remark in conclusion, that upon any other construction than that which we adopt, an injunction addressed exclusively to a corporation must be, in all cases, a nugatory and senseless 492 proceeding. A corporation cannot be attached, nor have we been able to discover that there are any means by which, when such is the form of the injunction, its obedience as a Corporation may be compelled or its disobedience punished. And that there are none, *Lord Loughborough*, in the case of the *Mayor of London vs. the Mayor of Lynn*, seems distinctly to admit. (1 *H. Black*, 209.) Unless the injunction, therefore, in such cases, operates upon those members and officers 493 of the Corporation by whom its corporate will be manifested, and corporate acts performed, and unless it creates a duty for which they are parties to the suit, are personally responsible,

it is emphatically *brutum fulmen*—the words may be those of command or menace, but they are addressed to no one, and signify nothing.

The next objection, that the omission to serve upon the Aldermen, with the injunction, a copy of the complaint, 494 rendered the service of the injunction itself, or as to them, inoperative and void, like the preceding, we are satisfied, must be overruled. It furnishes in this case no reason for not proceeding to an attachment.

Notwithstanding the positive terms of the code, (sec. 220,) we doubt exceedingly whether, when the injunction itself is duly served, the omission to serve a copy of the affidavit upon which it was founded, may, in all cases, be alleged as a valid excuse for disobedience. When the order of injunction can- 495 not properly be understood and consequently obeyed, without a knowledge of the contents of the affidavit, the service of a copy must doubtless be made. But when the injunction is plain and explicit, and leaves no doubt as to the act which the party upon whom it is served is required to perform, or desist from performing, it may well be doubted whether the irregular omission of the affidavit should be held to release him from the duty of obedience. In such cases, a knowledge of the contents of the affidavit would neither instruct him as to his duty, 496 nor avail to discharge him from its performance; since whatever may be the facts stated in the affidavit, the injunction, when emanating from a competent authority, until dissolved, must be obeyed. (*Krom vs. Hogan*, 4 *Howard*, P. R. 225; *Woodward vs. King*, 2 *Ch. Ca.* 203; *Sullivan vs. Judah*, 4 *Paige*, 446.)

The purpose for which the code very properly required that a copy of the affidavits shall in all cases be served, is not that the party upon whom it is served may determine whether he 497 will or will not obey the injunction, but merely to enable him, without delay, if so advised, to move for its dissolution.

It is not, however, upon the ground that in this case the alleged irregularity in the service of the injunction was not such as to excuse the disobedience that followed, that we overrule the objection. The papers show that there was in truth no irregularity that the defendant, Sturtevant, can be permitted to allege. A copy of the complaint, together with the injunction, was duly served upon the Mayor, on the 28th 498 of December, the day before the meeting of the Board of Aldermen. The service was properly made upon him as the chief officer, (2 R. S. p. 458, *section 5,*) and for that purpose the representative of the whole Corporation; and we are clearly of opinion, that this service was sufficient and effectual as to every member of the corporate body whose personal conduct as such the injunction was designed to control; and to whom the actual knowledge of its contents may justly be imputed. That the defendant, Sturtevant, and the Aldermen 499 who acted with him, possessed this knowledge is not denied; and it even seems that they well knew what were the allegations in the complaint itself. They have resolved that the reasons alleged for the injunction "were untenable in law and unfounded in fact." It is only in the complaint, however, that these reasons are alleged; and it is therefore from the complaint that their knowledge of them must have been derived. Under these circumstances, it would indeed be a mockery of justice to permit the alleged irregularity in the 500

service of the injunction, to excuse its deliberate and confessed violation—confessed, we mean, in the resolutions of the Aldermen, although not in the arguments of their counsel.

Passing, then, from objections merely preliminary and formal, we proceed to an inquiry which touches in a measure the merits of this motion, namely—whether the defendant, Sturtevant has, in fact, been guilty of the contempt with which he is charged; and this he certainly has not, unless he has committed some act from which the injunction, by its terms 501 or its necessary construction, commanded him absolutely to desist and refrain. It is true, that Mr. Sturtevant, and those who acted with him, have publicly declared that they understood the injunction in the very sense for which the counsel for the plaintiff contends, as the only sense of which its terms are susceptible. And it is also true, that thus understanding the injunction, they not only disregarded, but proceeded, so far as depended on their own action, to rescind and nullify it; but we shall not hold that they are concluded by their 502 mistakes, if a mistake they have committed. Their error does not work an estoppel; for, unless they have violated the injunction in its true legal construction, there has been no breach for which they are liable to be punished as a contempt, whatever may be thought of their intentions and their language.

What, then, is the command of the injunction? What the corporate act which its terms prohibit?

If we read the complaint, it is manifest that the sole object 503 of its prayer, which the injunction exactly followed, was to

prevent the adoption of the resolution in relation to a rail road in Broadway, which it alleged that the Common Council meant to re-consider, and had determined to pass ; but we have some doubts whether the allegations in the complaint can, with propriety, be invoked to govern the construction of the injunction ; and it is, therefore, to the terms of the injunction that, in considering the question we have proposed, we mean to confine ourselves. The language of the injunction is clear and unambiguous. The corporate act which it prohibits, is that 504 of granting to Jacob Sharp and his associates, or to any other person, the authority and privilege of laying down a double, or any other track, for a railway in Broadway, between certain limits, and if no such grant as a corporate act has been made, the injunction has not been violated—but the fact that such a grant has been made, is undeniable ; it is not only confessed by all, but avowed and gloried in by those who made it, and those who have obtained it. The resolution making the grant has been re-considered and adopted ; and in the 505 very mode which it prescribes, has been accepted by the grantees, and Jacob Sharp and his associates now claim to possess, by a valid title, the very right, liberty, and privilege, which the injunction, speaking the voice, and carrying with it the authority of this Court, has said they should not be permitted to acquire. The corporate act that the injunction prohibits, has been performed ; and it therefore seems an affront to common sense, to say that the injunction has not been violated. It has been violated, just as certainly as if by express words it had 506 forbidden the passage of the resolution it was designed to prevent. We repeat, the injunction has been violated ; and the only inquiry that remains, is by whom it has been violated ? and who, assuming it to have been rightfully issued, are ame-

nable to this Court for their contempt of its authority. It is idle to speak of its violation as merely a corporate act, for which no member or officer of the corporation is, or can be, liable.

507 We have already shown, that an injunction may be properly directed to a corporation solely by its corporate name ; and that when so directed, it operates to restrain the personal action of every member of the corporate body, by whose assent or co-operation, the corporate act that is forbidden may be accomplished.

In the case before us, the injunction not only commanded the Board of Aldermen and the Board of Assistants not to make the grant to Jacob Sharp and his associates which it  
508 describes, but it commanded each Alderman and each Assistant not to give his assent to any such grant, if proposed for his adoption—not to give his assent to it for the purpose and with the intent of rendering it operative and effectual as a corporate act. The resolution adopted by the Common Council is the very grant that the injunction describes ; and to this grant, every Alderman who voted for the resolution, with the intent that it should take effect as a corporate act, has given his assent. Every one of them, therefore, who has thus assented,  
509 the conclusion is plain and irresistible, has done the very act that the order of the Court commanded him not to do ; and by so doing, has violated its mandate and contemned its authority. And unless this be true, it follows that when an injunction, directed to a body consisting of several persons, commands them not to perform a joint act, although all

unite in performing the act, no one of them breaks the injunction—no one of them is liable to be punished.

Two partners intended, by their joint act, to make a fraudulent transfer of their whole partnership property ; suspecting 510 their design, their creditors file a complaint, and obtain and serve an injunction, by which the intended transfer, the meditated fraud, is strictly forbidden. The transfer is, however, made, the fraud accomplished, the authority of the court defied, and the guilty partners rejoice in their impunity. Neither of them, it seems, can be attached, for the valid reason, that the fraudulent transferer was the act of both ; and, therefore, the act of neither.

Let it not be said, that the supposed case is not analogous ; 511 the analogy, in truth, is perfect ; for it is not at all affected or impaired by the circumstance that the body to which, in the present case, the injunction was directed, was a corporation, not a partnership. The injunction in this case commanded the Common Council not to make a certain grant to certain persons. The Common Council has made the grant ; yet we are told that the injunction has not been broken, or, if broken, has been broken by the Common Council alone, the two boards forming the body ; and not all by the individual mem- 512 bers, by whose concurrent votes the grant, as a corporate act, was adopted and effected.

In conclusion, the whole argument, it is manifest, depends upon the truth of the proposition with which we started, namely, that an injunction directed to a corporate body, is binding upon the individual conscience, and restrains the in-

dividual action of each of its members. If this, as a proposition of law, is certainly true ; and that it is so, we cannot 513 doubt, then the injunction, which, in this case, has plainly been violated by the Corporation as a body, has just as plainly been violated by every member who has given his individual assent to the corporate act by which such violation was effected. That assent was given by the member now before us, Oscar W. Sturtevant. He has therefore, as an individual, violated the injunction ; and having thus been guilty of the contempt with which he is charged, the attachment moved for must be issued against him, unless the order of this court, 514 which he has disobeyed, was itself unlawful and void.

It is upon this ground alone, that he has himself justified his disobedience ; and it is upon this ground alone, that he can be exempted from its punishment.

Before we proceed, however, to the discussion of the question whether the order of this court, from its total want of jurisdiction, was illegal and void ? there are some considerations hitherto unnoticed, to which it seems expedient to divert.

Hitherto, we have passed over in silence an argument upon 515 which the counsel for the defendants seemed to lay a peculiar stress—namely, that the injunction was not violated at all, by the mere adoption of the resolution containing the grant to Jacob Sharp and his associates ; and, consequently, not violated by those by whose votes the resolution was passed.

The adoption of the resolution, it was said, was not a grant ; it was merely an inchoate and initiatory act, which, but for

the subsequent acceptance of the grantees, might have remained for ever ineffectual. Until this acceptance was executed and filed, no grant was made; no authority, right, or privilege given; and, consequently, until then, neither in its terms nor in its spirit, was the injunction violated. This acceptance, however, was the act of persons to whom the injunction did not extend; and for whose acts, neither the Corporation nor its members can be made responsible.

Notwithstanding the apparent confidence with which this argument was urged, we find it difficult to believe that it was seriously meant to be pressed upon our adoption; since it could hardly have escaped the counsel that, with equal propriety and force, might the same argument be urged in every case in which a grant, transfer, or any disposition of property whatever, is forbidden to be made, either by a corporation, a partnership, or an individual. In no case, is a grant effectual by the mere will and act of the grantor. In every case, it depends for its ultimate validity upon the assent and acceptance of the grantee. Hence, if the argument is valid, it follows that an injunction, which is meant to restrain a fraudulent or illegal grant, addressed only to the grantor, may be disregarded in all cases with entire impunity. You cannot punish the grantor if a fraudulent trustee or debtor; because the grant which he executed and delivered, might have been rejected by the grantee; and but for his acceptance, would have been wholly ineffectual. You cannot punish the grantee, for he was not named in the injunction.

The reply to the argument in the cases supposed, is exactly that which must be given in the present. The fraudulent

519 trustee or debtor is forbidden to make the grant, with the intent that it shall be effectual, and in a mode, by which it may be rendered so ; and when it is proved that he has done all that he could do to render the grant operative and valid, he is certainly and justly punished.

So in the present case, the Common Council, and a majority of its members, have done all they could do to render the grant they were forbidden to make, operative and effectual. They passed the resolution with the intent that it should operate as a grant ; and in the confident expectation that, by its acceptance, it would become such. If they meant otherwise, they either should not have adopted the resolution at all ; or, when they had passed it, should, as they might have done, have forbidden its acceptance. As the case stands, they have made the grant which they were commanded absolutely to desist and refrain from making ; and this grant, as they intended it by their permission and with their consent, has become absolute ; hence, if words have a meaning, or the law an intention, they have violated the injunction both in its letter and in its spirit ; and I am constrained to add, they meant to violate it, and knew they had done so.

521 We are told, however, that the members of the Common Council could not have acted otherwise than they did. Their charter bound them, it is said, to re-consider the resolution ; and when re-considered, it was not merely their right, but their duty, to vote upon it according to the dictates of their own conscience ; and to punish them for the exercise of this right, 522 would be injustice and tyranny. The answer is brief and conclusive. The charter imposed upon them no such absolute

duty as is asserted. When an ordinance or by-law is returned to the Common Council, we apprehend, that its re-consideration depends, in all cases, upon the will of the majority; and assuredly in the present case, they were not bound to re-consider the resolution at the time and in the manner they did. I add, that even upon the supposition that they were bound by the provisions of their charter, to re-consider the resolution, they were equally bound by the mandate of this Court to re- 523 scind and reject it when re-considered, if the order of the court was, in truth, issued in the exercise of its proper jurisdiction.

I pass, therefore, to the last and most important objection that has been urged as conclusive against the present motion —the alleged want of jurisdiction in this or any Court, to restrain the action of the Common Council upon the subject before them, as was attempted by the injunction which they chose to disregard. It was upon this allegation, that the de- 524 fence of the Common Council was mainly rested in the argument before us; and it is exclusively upon its truth, that its members, in the first instance, elected to place their own justification of their conduct. The question which it involves has been perplexed by much extraneous reasoning and learning, and complicated with many considerations that do not at all belong to it; yet, if I mistake not, it is simple in its own nature, and by no means difficult of solution.

The true and only question is, whether from the total want 525 of jurisdiction in this court over the subject matter to which the order of injunction related, the order was void, upon its face? for it is this defect of jurisdiction, and this alone, that has been or can be pretended to exist; and when it exists, it

must in all cases, be thus apparent. The injunction commanded the Corporation and its members to desist absolutely from the performance of certain specified acts; and, if this command could, under no circumstances, be rightfully addressed 526 by a court of equity to a municipal corporation, the Common Council and its members, in the just maintenance of their own rights, were bound to disregard it; but if it was a command that, under any circumstances and upon any grounds, for any reason whatever, this court might impose upon the Common Council and its members, it was at their own peril that they refused to obey it. They had no right to regulate their conduct by their own opinion, or the opinion of their counsel, as to the truth or sufficiency of the allegations in the 527 complaint, upon which the order addressed to them was founded. For the purpose of determining whether they would obey or disregard the injunction, they had no right to look into the complaint at all; and this for the plain reason, that the jurisdiction of the court may be certain and undoubted, and yet the facts and allegations set forth in the complaint be wholly insufficient to warrant its exercise. When this insufficiency exists, there is a want of equity in the complaint, for which the injunction will be dissolved; but this want of equity is no evidence of a want of jurisdiction, that, rendering the process 528 void, justifies disobedience. A party upon whom an injunction is served, (they are the words of Chancellor Walworth that I quote,) is not permitted to speculate upon the future decision of the Court as to the equity of the bill, and disobey the injunction, upon the ground that upon the merits it ought not to have issued. (*People vs. Spalding*, 2 *Paige*, 329; *Sullivan vs. Judah*, 4 *Paige*, 446.) I add, that if there are any valid grounds in law, upon which the injunction, in a particu-

lar case, might have issued, although not one of the grounds may be stated in the complaint, the court has jurisdiction, and 529 its order must be obeyed. It is erroneous, but certainly not void ; and it is only a certain, a manifest invalidity that can excuse and protect disobedience.

Although the want of equity, and the want of jurisdiction, (as was justly observed by the experienced and learned counsel who last addressed us,) are frequently confounded, not only by text-writers, but by judges ; yet, the distinction which separates them is very reasonable and intelligible, as well as certain and established. This distinction, however, I cannot but 530 think was, to a considerable extent, lost sight of in the arguments that were addressed to us on the part of the defendants ; and it is this circumstance that rendered a large portion of the observations that were made, and authorities cited, wholly inapplicable to the true and only question now before us. It is, however, that question alone, as I shall again state it, that I mean to consider and discuss.

Was the order of this court, which, as an illegal exercise of power, was disregarded by the Common Council, void upon its face ?

531

The order commanded the Common Council not to grant to Jacob Sharp, and others, or to any other person, the right, liberty and privilege of laying down a double, or any other track, for a railway in Broadway.

At the time this injunction was obtained, a resolution, making such a grant to Jacob Sharp, and others, was about to

be re-considered by the Common Council; and, as the terms  
532 of the injunction embrace this resolution, and were, undoubt-  
edly, meant to restrain its adoption, it is reasonable to con-  
strue the order exactly as it would be necessary to construe  
it, had it referred to and recited the resolution; and, by ex-  
press words, had forbidden the Common Council to re-con-  
sider and adopt it. It is this construction, therefore, that I  
adopt; and, for the purposes of this opinion, I shall treat the  
resolution as an ordinance by law; and its re-consideration  
and adoption, as properly acts of legislation in the fullest sense  
in which the term legislation can be justly applied to the acts  
533 of a corporate body.

Making these concessions—the denial of the jurisdiction of  
this court amounts to this—that a court of equity, of general  
jurisdiction, has no power, in any case or for any purpose, to  
restrain the legislative action of a municipal corporation, nor  
in any manner to interfere with or control its legislative dis-  
cretion; no matter to what subject the action may be directed,  
nor how manifest and gross the violation of law, even of the  
534 provisions of its own charter, that it may involve; and no  
matter by what motives of fear, partiality, or corruption, its  
discretion may be governed, nor how extensive and irreparable  
the mischief that, in the particular case, may be certain to  
result to individuals or the public, from its threatened exercise.

If this be true as a proposition of law, then the injunction  
order of this court, from the want of jurisdiction manifest on  
its face, was wholly void. If the proposition be not true, the  
535 order was valid, and should have been obeyed.

In justice to the counsel for the defendants, it must be admitted that they shrank not from maintaining the truth of the proposition in all its extent, well perceiving that the necessity of their argument admitted no alternative ; since, to admit a single exception, was to admit the jurisdiction which they denied.

In reply to a question put by the court, it was expressly affirmed, that, should the Common Council attempt by an ordinance, and from motives manifestly corrupt, to convey for 536 a grossly inadequate or merely nominal consideration, all the corporate property of the city, neither this nor any other court, would have power to suppress by an injunction, the meditated fraud, or when consummated, to rescind the grant, or punish its authors, or divest them of its fruits ; there could be no remedy, we were told, but from the force of public opinion and the action of the people at an ensuing election, and all this upon the ground, that neither the propriety nor the honesty of the proceedings of a legislative body, nor 537 while they are pending, even their legality, can ever be made a subject of judicial inquiry.

This, it must be confessed, is a startling doctrine. We all felt it to be so when announced ; and I rejoice that we are now able to say, with an entire conviction that, applied to a municipal corporation, it is just as groundless in law as it seems to us it is wrong in its principle, and certainly would be pernicious in its effects.

The doctrine exactly as stated, may be true when applied 538 to the legislature of the State, which, as a co-ordinate branch

of the government, representing and exercising in its sphere the sovereignty of the people, is, for political reasons, of manifest force, wholly exempt in all its proceedings from any legal process or judicial control; but the doctrine is not, nor is any portion of it, true, when applied to a subordinate municipal body; which, although clothed to some extent with legislative and even political powers, is yet in the exercise of 539 all its powers, just as subject to the authority and control of courts of justice, to legal process, legal restraint, and legal correction, as any other body or person, natural or artificial.

The supposition that there exists an important distinction, or any distinction whatever, between a municipal corporation and any other corporation aggregate, in respect to the powers of courts of justice over its proceedings, is entirely gratuitous, and it seems to me, is as destitute of reason as it certainly is of authority. The counsel could refer us to no case, nor have 540 we found any, in which the judgment of the court has proceeded upon such a distinction; nor, in our researches, which have not been limited, have we been able to discover that, by any judge or jurist, the existence of such a distinction has ever been asserted or intimated. Were it otherwise—had such decisions been found in the English reports, or in those of our sister States—had it been proved that in England or in other States the supposed distinction is the established 541 law, we should still be compelled to say that it is a law which we must refuse to follow; for the plain reason, that it is directly inconsistent with the paramount authority of our own constitution. The constitution of the State declares, that “all corporations shall have the right to sue, and shall be subject to be sued, in all courts, in like cases, as natural persons.”

(Con. art. 8, sec. 3.) There is no exception here of municipal corporations; and an exception which the constitution has not made, we have neither the inclination nor the power to make ourselves.

542

A corporation subject to be sued, is necessarily subject to every process or order that in the commencement or in the progress of the suit may be necessary to or be connected with the relief which is demanded. And the words "in the like cases," plainly mean, "for the like acts or omissions, and for the like reasons."

Rejecting, then, an imaginary distinction, the question as to the validity of the only defence which the members of the Common Council have set up in their own behalf, and on 543 which their counsel have chiefly relied, their entire exemption from judicial control in every proceeding that they may choose to clothe with the forms of legislation, is seen to possess a far deeper and wider importance than could at first have been imagined. If the members of the Common Council are entitled to the immunity which they claim; exactly the same immunity, and exactly upon the same grounds, may be claimed and justly claimed, by all who manage officially the concerns of any and every corporation in the city or States, the directors, managers, or trustees of every bank, insurance or trust company, and even of every public library, or hospital, dispensary, or savings bank. They have all, legislative powers in the same sense as the Common Council; powers not indeed as extensive in their operation, and not therefore as liable to be abused, nor as dangerous when abused, but just as legislative and discretionary in their nature. They all have the

544

power of making by-laws for the regulation of their affairs  
545 and binding on their members ; and they may all give the form  
of a by-law or resolution to any illegal or fraudulent proceeding  
into which they may be tempted or betrayed ; and when,  
in compliance with the prayer of stockholders or creditors, or  
of any whose rights and interests they are about to sacrifice,  
a court of equity attempts by an injunction, to restrain the  
proceeding, they may all with the same propriety as the  
members of the Common Council, defy the mandate, and  
denounce the attempt as an unwarranted and unprecedented  
546 stretch of judicial power.

Notwithstanding these observations, the question still re-  
mains, has this court, or any court of equity, the power to  
interfere with the legislative discretion of the Common Coun-  
cil of this city, or of any other municipal corporation ? And  
to this question, I at once reply, certainly not, if the term  
discretion be properly limited and understood ; and thus under-  
stood, I carry the proposition much further than the counsel  
who advanced it. This court has no right to interfere with  
547 and control the exercise, not merely of the legislative but of  
any other discretionary power that the law has vested in the  
Corporation of the city ; and hence I deem it quite immaterial,  
whether the resolution in favor of Jacob Sharp and his asso-  
ciates be termed a by-law, a grant, or a contract ; or whether  
the power exercised in passing it, be termed legislative, judicial,  
or executive ; for if the Corporation had the power of granting  
all the extraordinary privileges which the resolution confers,  
the propriety of exercising the power, and perhaps even the  
548 form of its exercise, rested entirely in its discretion. Nor is  
this all. A court of equity has no right to interfere with and

control in any case the exercise of a discretionary power, no matter in whom it may be vested—a corporate body or individuals, the aldermen of a city, the directors of a bank, a trustee, executor or guardian ; and I add, that the meaning and principle of the rule, and the limitations to which it is subject, are, in all the cases to which it applies, exactly the same. The meaning and principle of the rule are, that the court will not substitute its own judgment for that of the party 549 in whom the discretion is vested, and thus assume to itself a power which the law had given to another ; and the limitations to which it is subject, are, that the discretion must be exercised within its proper limits, for the purposes for which it was given ; and from the motives by which alone those who gave the discretion, intended that its exercise should be governed. I select, for the purpose of illustration, a single case : The directors of a bank have a large discretion in making dividends, in appointing its officers, and in fixing the 550 amount of their salaries ; and in the exercise of this discretion, a court of equity, in the just application of the rule that has been stated, has certainly no right to control them. It has no right to say what dividends shall be made, what officers be appointed, or what salaries be allowed. But, should the directors attempt to make a dividend of capital instead of profits, or to raise the salaries to a sum so exorbitant as to equal or exceed the annual profits of the company ; or in the case last supposed, by a secret compact, secure to themselves 551 a large proportion of the aggregate sum nominally allowed as a compensation to others, it cannot for a moment be doubted, that a court of equity would be bound, upon the application of creditors or stockholders, to restrain or annul, according to the circumstances of the particular case, the illegal, unjust or

fraudulent act. The act in the first case, would be an excess of power ; in the second, an abuse of discretion, and from its manifest prejudice to the stockholders, a breach of trust ; in 552 the last, a scandalous fraud ;—and to the mind of an equity lawyer, it would be an absurd and monstrous supposition, that, in either of the cases, the directors, by giving to the proceeding the form of a resolution of the Board, or by any other device, could evade the jurisdiction of the court, and enable themselves with impunity, to set its mandates at defiance.

553 A court of equity will not interfere when the discretion is legally and honestly exercised—and it has no reason to believe the fact is otherwise—but it will interfere whenever it has grounds for believing that its interference is necessary to prevent abuse, injustice or oppression ; the violation of a trust, or the consummation of a fraud. It will interfere—and it is bound to interfere—whenever it has reason to believe that those in whom the discretion is vested, are prepared illegally, wantonly or corruptly, to trample upon rights, and sacrifice interests, which they are specially bound to watch over and protect.

554 Having stated these principles, the discussion may be regarded as closed ; since the application of the principles to the case before us, is obvious and decisive. I shall therefore content myself with referring to a few of the authorities by which they are sustained ; and then proceed to apply theory to the facts of the case.

The doctrine which, when stated in a condensed form, may

be extracted from the decision of Lord Eldon, in the leading case of *Agar vs. The Regent's Canal Company*, (Cooper's *Eg. Cas.* 77,) is, that whenever a corporation is about to exceed 555 its powers, and apply its funds or credit to some object beyond its authority ; and whenever the purpose of the corporation, if carried out, would constitute a breach of trust, a court of equity cannot refuse to interfere, and give relief by an injunction ; and his lordship said that this was a most wholesome exercise of jurisdiction, since it would be most prejudicial to the interests of all with whose property the managers of a corporation might choose to interfere, if there were not a jurisdiction continually open and ready to exercise its power, 556 to keep them within their legitimate limits.

In the case of the *River Dun Navigation Company vs. North Midland Railway Company*, (1 *Railway Cases*, 135,) it was upon the same doctrine, that Lord Cottenham, a Judge scarcely inferior to Lord Eldon in judgment, learning and research —placed the exercise of a jurisdiction which he declared himself not at liberty to withhold. The case of *Frewin vs. Lewis*, is one of those upon which the counsel for the defendants placed a strong reliance ; for it was in this case, that Lord 557 Cottenham dissolved an injunction against the Poor Law Commissioners ; upon the ground, that its continuance would operate as an undue restraint upon the legal discretion of those important public functionaries ; yet in this very case, his lordship was careful to assert and maintain the rightful jurisdiction of his court ; and said, “ that when the public functionaries are departing from the powers which the law has vested in them, and are assuming a power which does not belong to them, this court no longer considers them as acting under their commis- 558

sion, but treats them, whether a corporation or individuals, as persons dealing with property without legal rights ;" and he added, " that when such persons infringe or violate the rights of others, they become like all other individuals, amenable to the jurisdiction of this court by injunction." The force and application of this language will be fully understood, when we remember, that the powers of the Poor Law Commissioners are legislative, discretionary and political, even in a more extensive sense than those of our own corporation.

559 I refer lastly, to the three cases of the *Attorney General vs. Aspinwall*, (2 M. & C. 613;) *Same vs. Corporation of York*, (4 M. & C. 30;) and the *Same vs. Mayor of Dublin*, (2 Bligh, N. R. 312;) as proving, that when property held by a municipal corporation is clothed with public duties, or the objects to which it must be appropriated or applied are defined by law, there arises a trust, the violation of which, a court of equity, has not merely the power, but is bound to prevent by an injunction.

560 The streets of this city, we are told, are the property of the corporation, in which the fee is vested ; but it is certain that this property is clothed with public duties, and that the objects to which alone it can be appropriated or applied, are strictly defined by law. Hence, according to the cases last cited, there is a trust in relation to the streets, the performance of which, a Court of Equity is competent to enforce by a decree ; and consequently the violation of which, when threatened, it is bound to prevent by an injunction.

561 We are now in a condition to answer very decisively the

question proposed—was the injunction order directed to the corporation void upon its face, from the total want of jurisdiction in the court by which it was issued ? And the answer is, that assuredly it was not, if there is any ground whatever upon which this court could lawfully restrain the corporation from making the grant which the order described ; and that there are many grounds upon which the restraint could be legally and justly imposed, we deem it no longer possible to doubt. 562

A few, I shall now state :

1. It may be, that the corporation has no power whatever either to establish itself, or to grant to others, the privilege of establishing a railway in any of the public streets in the city ; and whether they have or not, is a question of law, which belongs not to the corporation but to courts of justice to decide ; and until the decision, the exercise of the power may and ought to be restrained.

2. It may be, that the establishment of a railway in Broadway would operate as an injurious monopoly, debarring the bulk of our citizens of its beneficial use and enjoyment ; and securing them almost exclusively to the grantees of the corporation. The creation of such a monopoly, would not only be an excess of authority, but a breach of trust ; which may and ought to be prevented by an injunction. 563

3. It may be, that the building of a railway in Broadway—from the inconvenience and discomforts it would create to citizens generally, and its special injury to the inhabitants—would be a public nuisance. To prevent the creation of a 564

nuisance, no matter by whom created, is not only within the jurisdiction of the court; but, upon proper allegation in a complaint, its positive duty. The mode of relief is an injunction.

4. It may be, that the Common Council intended, from motives of partiality or corruption, to make the grant to Jacob 565 Sharp and his associates, upon terms far less beneficial than could certainly have been obtained from others; thus defrauding the treasury of the city, and imposing a heavy and unnecessary burthen upon its tax-paying inhabitants. In such a case, to issue an injunction forbidding the grant, is not to interfere with a legal discretion, but to prevent a flagrant breach of trust, and the completion of an extensive fraud.

I have already said that, in considering the question before 566 us, it is quite immaterial whether all or any of these grounds of jurisdiction and relief are alleged in the complaint, since the omission would only prove a want of equity in the complaint, not at all of jurisdiction in the court; but it so happens, that all of them are alleged in the complaint; and so distinctly and fully alleged, that the Judge who issued the order of injunction, would have failed in his duty, had he refused to grant it. Upon such a complaint, he had no liberty of refusal. It is possible, as the counsel for the defendants 567 have insisted, that all the material allegations in the complaint are groundless in law or in fact; and that hereafter, we may ourselves be satisfied that they are so; but I shall not now express or intimate any opinion upon questions that can only be properly discussed and considered, upon a motion to dissolve the injunction, or upon the final hearing.

The conclusion at which I have arrived, and which necessarily follows from the observations that I have made, is, that the order of injunction which Alderman Sturtevant refused to obey, was a valid exercise of the established jurisdiction of 568 this court; and consequently, that no adequate cause has been shown why an attachment should not issue against him for the contempt, of which, from the papers before us, he appears to have been guilty. In this conclusion, all the judges who assisted me—by each of whom, separately, all the questions in the case have been carefully examined—entirely concur.

The motion for an attachment, is therefore granted.

## OPINION OF BOSWORTH, J.

The plaintiffs move for an attachment against Oscar W. Sturtevant, one of the aldermen of the city, to arrest him for 569 a contempt of Court, in disobeying an injunction order made in this action, by a Judge of this Court, on the 27th December, 1852.

Having, with others of my brethren, at the request of the Judge holding the Special Term at which the motion was made, heard the argument of counsel for and against the motion, I shall, as briefly as practicable, state some of the views formed upon a consideration of the propositions argued and authorities cited.

570 To present these intelligibly, it is necessary to state some of the prominent facts of the case.

On the 27th December, 1852, upon a sworn complaint made by the plaintiffs, "as well on their own behalf as on behalf of all other corporators and tax-payers of the City of New-York," who might be affected by the several matters stated in the complaint, the plaintiffs applied for and obtained an injunction order in this action.

The order, by its terms, commanded "the Mayor, Aldermen and Common Council of the City of New-York, their counsellors, attorneys, solicitors and agents, and all others acting in aid or assistance of them, and each and every of

them," to "absolutely desist from granting to, or in any manner authorizing Jacob Sharp and others, or their associates, or any other person whomsoever, the right, liberty or privilege of laying a double or any track for a rail road in the street known as Broadway, in said City of New-York."

The complaint on which this order was granted, states that the plaintiffs are citizens of the State, reside in the city, severally own real estate situate on Broadway, and have severally been annually taxed, and have paid such taxes to an amount exceeding \$250 per annum, and that such taxes were levied to defray the annual expenses of the city. It proceeds to state the amount of taxes levied in each year, from 1846 to 1852, inclusive; that in 1846, they amounted to \$1,654,323; in 1852, to ..... 2,561,650; and that the estimated amount required for 1853, is 3,972,650. That by reason of alleged corrupt and illegal acts of the defendants, the taxes of the city are annually increasing to an alarming degree.

That the City of New-York, is an ancient and chartered city; and the citizens and inhabitants thereof, are a body politic and corporate, under the name of the Mayor, Aldermen and Commonalty of the City of New-York.

That all the property, jurisdiction, franchises and privileges, held and exercised by the Corporation, were given, granted, and acquired under this corporate name. That all the powers of this corporation are held by them, upon the trust that they shall be used and exercised for the benefit of the citizens and

inhabitants of said city, without any fraud, corruption, evil practice or deceit. That this body politic and corporate is capable of suing and being sued, in all courts of record, in all manner of actions.

That on the 19th of November, 1852, the Board of Aldermen adopted certain resolutions,—a copy of which is annexed to the complaint ;—and on the 6th December, 1852, the Board of Assistant Aldermen also adopted the same resolutions, and ordered them to be transmitted to the Mayor for his approval. These resolutions are fifteen in number.

The first declares “that Jacob Sharp, and others specially named, and those who may for the time being be associated with them, all of whom are herein designated as associates of the Broadway railway, have the authority and consent of the 576 Common Council to lay a double track for a railway in Broadway and Whitehall or State street, from the South Ferry to Fifty-ninth street, and hereafter to continue the same, from time to time, to Manhattanville.

The second provides that the tracks shall be laid in or near “the middle of the street,” the outer rails not exceeding twelve feet and six inches apart.

The tenth, that the “associates shall cause the street to be well swept and cleaned every morning, except Sundays, 577 before 8 A. M. in summer, and 9 A. M. in winter, below Fourteenth street ; and above that, as often as twice a week, —when the weather will permit.

The eleventh, that five cents fare for each passenger, is the highest fare that the associates shall be allowed to charge.

The twelfth, that the associates shall pay, for ten years, from the opening of the railway, an annual license fee of \$20 per car, "and shall have a license accordingly;" and after that period such license fee as the Corporation, with the permission of the Legislature, shall then prescribe.

The thirteenth, that the associates, or a majority in interest, 578 within a reasonable time after the passage of such resolution, "shall form themselves into a joint stock association, which association shall be vested with all the rights and privileges hereby granted;" shall have power to establish by-laws, providing for the construction, "operation and management of the said railway;" and generally, the means and mode of establishing the railway, and carrying it on, and of controlling and managing the property and affairs of the said association." 579

The fourteenth, that "the association shall not be deemed dissolved by the death, or any act of any associate;" and that "said associates may at any time incorporate themselves under the general rail road act, whenever two-thirds in interest of the associates shall require it."

The fifteenth, "that the associates named in the resolution shall, by writing filed with the Clerk of the Common Council, signify their acceptance thereof, and agree to conform thereto; and all new associates or assigns duly admitted according to 580 the provisions of the articles of association and by-laws, shall be deemed parties to such agreement.

The complaint further stated, that before such resolutions were passed, men of wealth, character, and standing, residents of the city, abundantly able to perform their contracts, applied to the Common Council for the privilege and authority to construct the road, and offered, in addition to all the terms imposed by the resolutions on Sharp and his associates, to 581 carry passengers at a less charge than five cents each, and pay a large bonus into the treasury of the city.

That one of the propositions was, to pay a bonus of \$1,000,000, and charge only three cents fare.

Another was, to pay \$1,000 per car, and charge only three cents fare.

Another was, to pay \$1,666 per car, and charge five cents fare.

The complaint stated, that on the 18th of December, 1852, the Mayor returned the resolutions to the Board of Aldermen 582 without his approval, and with objections thereto ; a copy of which objections was annexed to the complaint.

The Mayor stated, among other things, as objections to the laying of a rail road in Broadway, that it would, in his "judgment, materially interfere with the comfort and convenience of all classes ; would seriously interfere with the business of parties resident thereon ; and would depreciate the value of property on the line of the street, fully twenty per cent. ;" and that the grant of the privileges to Jacob Sharp and associates, 583 on the terms embraced in the resolutions, to the exclusion of

those who had made offers so much advantageous to the city, would be a perversion of the rights of the community, to which they would not tacitly submit.

The complaint further alleged, that the members of each Board of the Common Council, who voted for the resolutions, and constituting a majority of the whole number, had declared a purpose to pass these resolutions, notwithstanding the disapproval and objections of the Mayor; and were continuing their session by adjournments from time to time, with a view 584 to carry their declared purpose into effect.

That the persons named in said resolutions, avowed a purpose to accept the same in writing as soon as passed; and to proceed to break up the pavement, lay down the railway, and establish a rail road in Broadway.

That the laying of the railway would occupy some four months; would render the street impassable while being constructed; would appropriate the street to a use exclusive in its nature; would deprive every citizen of his right to the free 585 and common use of the whole carriage-way of the street; and that the railway, if constructed, would be a public nuisance in the street.

It is also alleged, that the defendants had no right by law to construct a rail road in the street, or to authorize others to do so; that if they had power to grant the use of the street for such a purpose, it would be a palpable fraud upon the whole community, to grant it to one company, with the power to charge five cents fare; when another would construct and keep

586 it in operation, and charge only three cents fare ; or to give the grant to a company, with a stipulation that they should be charged a license fee of only \$20 per car ; while others offered to pay for the privilege, a fee of \$1,000 per car, and charge only three cents fare.

Other allegations of fact were stated in the complaint ; and other objections presented against the defendants being allowed to make the grant, or to give the authority, purporting to be made and given by the resolutions.

587 The judge to whom application was made for the injunction order, granted it on a verified complaint stating these facts to be true. Whether true or false, is a question which we are not called upon to determine on this proceeding. To determine whether he had any jurisdiction to make the order, the complaint alone can be looked at ; and every thing contained in it and stated to be true in fact, must be deemed to be true for all the purposes of the question before us.. It was on the facts stated in the complaint, and those only, that the order 588 was made. If the Judge, on those facts, had jurisdiction to make the order ; it was the duty of those to whom it was directed, to obey it, until they had procured it to be vacated. If he had jurisdiction to make the order, it is incontestible that it was his duty to make it, if the facts stated in the complaint are true.

According to the allegations in the complaint, the Common Council, against the objections of the Mayor, were about to grant to Jacob Sharp and others, authority and power to construct and use a railway in Broadway, with liberty to charge

each passenger five cents fare, on payment to the city of a 589 license fee for each car run, of only \$20 per annum; while others stood ready to take the grant, and construct such a railway, and run cars with equal accommodations, and charge only three cents fare, and pay a license fee of \$1,000 per annum.

As between two such propositions, there can be no pretence for saying that in the exercise of an honest discretion, the former might be preferred to the latter. It is not a debateable question, whether a license fee of \$1,000 per car, per annum, 590 is more advantageous to the city than one of \$20; nor whether the interests of the community will be better subserved by each citizen being compelled to pay a fare of three cents instead of five. Therefore, even if it can be successfully maintained that the Common Council had the power to make the grant which the resolutions purport to make, it would be a gross abuse of power, and a flagrant violation of public duty, to make the grant as it was made; instead of making it to those who would pay, at the least, an additional million of 591 dollars for it into the public treasury, and exact from the passengers only three cents fare instead of five. Is it incontestible, that such an abuse of power and violation of duty cannot be restrained by any Court?

It must be conceded, that this Corporation is liable to be sued, that the plaintiffs have capacity to sue, and that this Court has power to make the order in question, if any Court had power to make it, on the facts stated in this complaint. It is undeniable, that these are matters which the defendants 592 may properly be restrained by injunction from doing.

If the facts stated in the complaint are true, the Common Council were intending, so far as they possessed power to accomplish the purpose, to grant to an association of individuals the right of appropriating to their exclusive use, to a certain extent, a portion of the centre of the main street of the city; and to the same extent, to deprive all other inhabitants of the city of the right and privilege previously enjoyed by 593 them of the free and common use of the whole of the carriage way of said street. They were about to make a grant authorizing the grantees to impose a charge or tax of five cents on every inhabitant who should ride in their cars; while others offered to construct a road in the same manner, and charge only three cents fare; and in addition to this, pay into the treasury from \$100,000 to \$200,000 per annum, or \$1,000 per car.

The part of the charter or of any legislative act, authorising this to be done, has not been pointed out. To make such a 594 grant under such circumstances, even if the power exists to make any grant for the construction of a railway on the ground of its being "deemed good, useful, or necessary, for the good rule and government of the body corporate," or with a view to public convenience, would be a clear abuse of power and violation of duty.

No one can pretend that it would promote public convenience, or tend to the good rule and government of the body politic, to compel every citizen to pay five cents fare instead 595 of three; or that the public treasury should be permitted to receive only \$20, instead of \$1,000 per annum, for every car run.

In *Frewin vs. Lewis*, (4th *Mylne and Craig*, 249,) the defendants were the Poor Law Commissioners and the guardians of the Holborn Union, under the Poor Law amendment act, (4 and 5, Will. IV. chapter 76.) Lord Cottenham, in speaking of the jurisdiction of the court over bodies constituted like the Poor Law Commissioners, says, that, "If they are assuming to themselves a power over property which the law 596 does not give them, this court no longer considers them as acting under the authority of their commission, but treats them, whether they be a corporation or individuals, merely as persons dealing with property without legal authority." \* \* \* "And if, under pretence of an authority which the law does give them to a certain extent, they go beyond the line of their authority, and infringe or violate the rights of others, they become, like all other individuals, amenable to the jurisdiction of this court by injunction."

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Is it not clearly going beyond the line of any authority vested in the Common Council to deliberately subject every inhabitant of the city to the necessity of paying five cents every time he may ride on the proposed railway; when others will construct the road in the same manner, and with the same accommodations, and charge only three cents? Is there any lawful authority to unnecessarily tax the whole body of the people? Can a two cent tax be imposed upon each citizen every time he may pass up and down Broadway, from mere 598 caprice, without any assignable cause, and under the power conferred to pitch, pave, regulate, widen, or alter the street?

In the case of the Attorney General against Forbes, the bill was filed in the name of the Attorney General, at the

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relation of Thos. Tindale, Treasurer, and by the relator on behalf of himself and all other of the inhabitants of the county of Bucks, (2 *Mylne and Craig*, 123.) The court, in speaking of the question of parties, as well as of its jurisdiction, remarked, that "In informations and proceedings for the purpose of preventing public nuisances, the ordinary course is for the Attorney General to take it on himself to sue, as representing the public; but it is equally certain that individuals who conceive themselves aggrieved, may come forward and ask the assistance of the court to prevent a public nuisance, from which they have individually sustained damage."

I can perceive no good reason why a court should not restrain a municipal corporation as well from infringing the public franchise, in a case presenting an unquestionable abuse 600 of power, to the prejudice of individuals and the whole body politic, as from granting mere property to a particular association of individuals, where others stand ready and offer to pay double the price for the same property.

Municipal corporations possess only such powers as are specifically granted by the act of incorporation, and such as are necessary to carry into effect the powers expressly granted. In the appropriation of the funds of the people, they are creatures of limited powers; and when they attempt to appropriate 601 the public funds to purposes not authorized by the charter or by positive law, whether it be done by resolution, ordinance, or under the form of legislation, their act is without authority, and void. *Hodges vs. City of Buffalo*, (2 *Denio*, 140;) *Halstead vs. The Mayor of New-York*, (3 *Coms.* 430.)

An attempt to sell to certain persons the public wharves, piers and slips, or to lease them for a term of years for a fourth or a tenth of what others offered and were able to pay, would be a clear abuse of power, and a gross fraud upon the public, 602 which ought to be restrained. If any doubt should be felt, whether such an interposition of the court would not be going further than was evidenced by any reported case, none could be entertained that it would not be going further than the prevention of fraud and the protection the public required ; and if the action invoked could not be rested on any better principle, it might be safely placed on the ground, that "fraud and damage, coupled together, entitle the injured party to relief in any court of justice."

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It is not intended to deny the proposition, that where the exercise of discretion is confided to persons appointed by law, or to a municipal corporation, a court will not attempt to control the exercise of that discretion. But if, under pretense of exercising the discretionary powers thus delegated, they threaten, and are about to do, what is undeniably a gross abuse of power, to the injury, and in fraud of those for whose benefit these delegated powers are to be exercised, and to the injury and in fraud of the rights of individuals and the public, I 604 know of no principle or case which precludes the interference of the court to prevent the threatened injury. (*Oswego Falls Bridge Company vs. Fish*, 1 Barb. ch. 547; *The Attorney General vs. Mayor, &c. of Mobile*, 5 Port. 279; *The Attorney General vs. The Great Northern Railway Company*, 3 L. & E. 263; *Munt vs. Shrewsbury and Chester Railway Company*, ib. 144; *Waterman's Eden on Injunctions*, vol. 2, p. 259, and notes.

605 Assuming, but not conceding, the authority of the Common Council to consider whether it was expedient to grant authority to construct a railway in Broadway on any terms—on which point, no opinion is intended to be expressed—it is absurd to insist that, as between two sets of applicants, equally reputable and able, and offering to accept a grant on the same terms, as far as the mode and manner of constructing the road, and of furnishing and running cars are concerned, there is any pretense for saying that, in the exercise of an honest or 606 intelligent discretion, the grant may be made to one set of applicants, and allow them to charge five cents fare; instead of making it to another set of applicants, who would take it with a prohibition against charging more than three cents fare.

It would be a remarkable abuse of power and violation of duty, to make a grant interfering with the right of every citizen to the common and unobstructed use of the street as a highway, and appropriating it in part to the exclusive use and personal emolument of the grantees, and confer on them 607 power to tax every inhabitant of the city and State five cents for riding in the cars; when others would take the grant, furnish the same accommodations to the public, with power to charge only three cents fare.

If such an abuse of power and breach of trust cannot be restrained, then the making of the grant could not have been restrained, if the purpose had existed and been avowed, to make it for the nominal consideration of one dollar.

That it may be restrained, is incontestible, as I think, both 608 upon principle and authority.

The only serious question upon the facts of any case that may be presented, is, whether the suit should be instituted in the name of some one representing the whole people, or whether it may be brought in the name of an individual? That a suit may be instituted in the name of an individual, to restrain a public nuisance, when it occasions special injury to the plaintiff beyond that which the community suffers in common with him, is expressly affirmed in the Attorney General vs. Forbes, and has been repeatedly decided on reported 609 cases—6 J. Ch. 439, *Corning vs. Lansing*, 8 Simons, 193; *Spencer vs. London and Birmingham Rail Road Co.* ib. 272; *Sampson vs. Smith*, *Story's Equity*, vol. 2, S. 934; *State of Pennsylvania vs. Wheeling Bridge Co.* 13 How. Sup. C. R. 566, 576, 608.

In this case, the complaint alleged facts which, it is claimed, establish the position, that the construction of this railway would be a special injury to them and other owners of property situate on Broadway. On these facts, the Judge who made 610 the order was required; and it became his duty to exercise his judgment, and determine whether this claim was well founded. Whether he decided wisely or not, is wholly foreign to the question of his jurisdiction. If he decided erroneously, the proper course of the defendants was to apply to him to vacate the order.

If the alleged facts stated in the complaint were untrue; if they placed the intended action of the Common Council, and their motive with respect to it, in an aspect grossly unjust to 611 them; and if the allegations in the complaint were a fraud upon the Court, the appropriate course was to show this by

affidavit, and move for a summary discharge of the order, and for such action against the plaintiffs, as such conduct would make it the duty of the Court to take. The remarks made by the Court in *Noe vs. Gibson*, 7 *Paige*, 513; and in *Russell vs. East Anglican Railway Company*, 1 *L. and Eq.* R. 101, are applicable to the duty of the defendants in this 612 case. In the latter case, the Court said:—"I know of no act of this Court, which may not be questioned in a proper form, and on a proper application; but I think it is not competent for any one to interfere with the possession of a receiver, to disobey an injunction, or to disobey any other order of the Court, on the ground that such orders were improvidently made—they must take a proper course to question them; but while they exist, they must obey them; I consider the rule to be of such importance to the interests of the 613 public, to the peace and safety of the public, and to the administration of the justice of this Court, that it is a rule I shall hold inflexible on all occasions," p. 106. "This Court has to maintain its authority for the benefit of the public; and it can only do that, as I have before said, by supporting its officers in the execution of the orders and processes of the Court; and not allowing disobedience and resistance to be the mode of questioning the propriety of the exercise of the discretion of this Court, p. 119.

I shall but briefly notice a few of the many other points 614 argued or suggested.

These resolutions are, in no proper sense of the term, a legislative act; they are, in substance and effect, a contract, by which certain rights and privileges are granted to the

associators upon certain terms and conditions, and for a stipulated compensation, to the exclusion of all others. It depends entirely upon their will, whether any new members shall be let into the association, and upon what terms. If any of the clauses of the resolutions partake of a legislative or by-law character, they are few and unimportant, compared with 615 those which relate to matters purely of contract. The injunction order, by its fair meaning, prohibited the Common Council from granting to Sharp and others, the right or privilege, or in any manner authorizing them, to construct any railway in Broadway.

When the resolutions were passed, the grant was made, and the authority was given. Nothing more was to be done, or could be done by them. It only remained to be seen whether the grantees would file their written acceptance, 616 agreeing to conform thereto. This was immediately filed. Assuming that the act is revocable, it is enough to say, that instead of there being a purpose manifested to revoke it, it was committed against the objections of the Mayor, in defiance of the injunction; and resolutions were passed rebuking the Judge, who made the order for attempting to restrain the doing of the act.

I think there is no just ground for saying that the injunction did not prohibit the acts subsequently done; and certainly 617 none for saying, as the case now stands, that it was not understood as being a direct and positive prohibition against doing what was in fact done.

If it be assumed, that the resolutions would confer no

authority to take up the pavement and construct a railway, and that all who should undertake to act under such authority would be wrong-doers, an injunction restraining them from doing such acts, would not be void. That is the only proceeding which could prevent the necessity of a multiplicity of suits; and in actions sounding merely in damages, it is obvious that no adequate redress could be obtained.

It was only by the members of the Common Council that the inhibited grant could be made. It was by their acts only that the injunction could be violated. A corporation acts only by its officers and agents. When enjoined from doing anything, and the injunction is disobeyed, the disobedience is not the act of the intangible and impalpable statutory being bearing the corporate name, but of the individuals by whom it acts. Process is served on a corporation, by serving it on some of its principal officers, which service is a good commencement of a suit against it. And an order which restrains a corporation from doing an act, restrains every officer of it from doing the thing prohibited; and if he does the act knowing that an order has been made prohibiting it, he is chargeable with the consequences of a deliberate violation of an order of the court.

If violated, it is by the officer or agent who performs the prohibited act. If the officers cannot be punished, no one can. The idea of sequestering the property of a municipal corporation, for disobeying an order prohibiting it from doing acts highly injurious to every citizen of the body politic, with a view to compensate those citizens for the injuries thus inflicted, is not intelligible. It is taxing them to pay losses occasioned by

a breach of trust committed by those entrusted with exercising the taxing power for their benefit. First, Every inhabit- 621 ant of the city is injured; and, by way of compensation, those who inflicted the injury, tax them to its full amount to remunerate them for the loss.

The statute provides, that not only "parties to suits" may be punished for any "disobedience to any lawful order, decree, or process" of the Court, but that "all other persons" may be. 2. R. S. 534, s. 1, sub. 1, 3, and 8. It is laid down in books or practice, that, "as an injunction to restrain waste, &c. is usually directed to the party, his servants, workmen, 622 and agents; consequently, if his servants, workmen, or agents, having had notice of the injunction, do anything inhibited by it, they will be guilty of a contempt." 1 *Barb. ch. p. 634, and note s.* This rule is in terms, only of the equivalent import with the third subdivision of the section of the statute above cited. It is also laid down as settled practice, that, so far as the question of liability to punishment for a contempt of court is concerned, it is enough that the party has actually notice of it, although it may not have been regularly served on him. 1 *Barb. ch. pr. 693, (notes 1, m, n, and o, and cases 623 there cited.)* *McNeil vs. Garrat*, 1 *Young and Coll.* 97, is a recent authority to that effect. *Mathews vs. Smith*, 3 *Hare*, 331, is an authority that a party obtaining the injunction, may be punished for publishing a notice respecting it, which misrepresents the relative position or character of any of the parties to the cause. In *ex parte Van Sandru*, 1 *Phillips*, 445, a publication speaking in less severe and disrespectful terms of the judgment of the Court, than the rebuking resolutions 624 did of the injunction order made in this action, was charac-

terized by Lord Cottenham, as "a gross contempt of the Court." Lord Hardwick, in a case of the "*General Evening Post*, 2 Atk. 469," in enumerating the different kinds of contempts, states as one distinct head of contempt, the "scandalizing of the Court." Such an act falls clearly within the spirit, if not the very letter, of 2 R. S. sec. 10, sub. 6.; *id.* 535, sec. 1, sub. 8; 2 Daniels Ch. R. 1277; 5 Price, 518; *Waterman, Eden on Injunction*, p. 94 to 102-3.

The effect of not serving with the injunction order, a copy of the affidavit on which it is granted, is, that a defendant may procure the order to be set aside for irregularity.—2 *Paige*, 394.

An injunction order regularly granted, of which a party has knowledge, cannot be treated as a nullity, and violated with impunity, before the party obtaining it, in the exercise of due diligence, is able to serve it; nor after it has been served, because the service was not, in all respects, perfectly regular, 626 where there is no pretence that the person or party disobeying it, did not have full and accurate information of the acts forbidden by it.

I am of the opinion that no objection, either of form or substance, has been presented which can exonerate Mr. Sturtevant from the consequences of a deliberate and marked disobedience of the order, or which could furnish a respectable apology for the Court for omitting to take such notice of it as is due to the interests of the public, and to a proper administration of justice in behalf of parties to suits, and of the whole 627 community.

## S U P E R I O R C O U R T.

SPECIAL TERM, March 1, 1853.

Judges DUER, BOSWORTH and EMMET, on the bench.

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The People	}
vs.	
Oscar W. Sturtevant.	

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BOSWORTH, J. furnished to Judge DUER, the following advisory opinion; which was adopted by him, as the opinion of the Court.

The specific question under consideration is, shall the defendant be required to answer the fifth interrogatory? This proceeding is based on an allegation, that the defendant has disobeyed an injunction order made by a Judge of the Court, in an action pending therein. The papers on which the attachment was issued, allege that the defendant, in addition to disobeying the order, introduced and voted for a certain preamble and resolutions relating to the issuing of the injunction, the acts prohibited by it, and professing to state the grounds on which the defendant assumed to disobey it. The fifth interrogatory calls upon the defendant to answer whether he did not vote for such preamble and resolutions? and whether, by his vote and others, they were not adopted by the Board of which he is, and

was then a member? To determine whether the defendant should be required to answer it, it is necessary to look at the nature of the present proceeding; the ends that may properly be accomplished by it; and whether the fact of having voted, or having omitted to vote for them, is one that can legitimately be taken into consideration in the final disposition of 630 this matter, and which can justly affect the ultimate decision.

The code provides, that the order which has been disobeyed, may be enforced as the order of "the court." (Code, sec. 218.) Sec. 471 declares, that until the Legislature otherwise provides, the code "shall not affect any proceedings provided for by" chapter 8, of the third part of the Revised Statutes, excluding the second and twelfth titles thereof, unless some provision thereof is plainly inconsistent with the code, and 631 that any such provision shall be deemed repealed. These proceedings are instituted under the thirteenth title of that chapter of the Revised Statutes. The provisions of the Revised Statutes must, therefore, furnish a solution of the question under consideration. They provide that "every court of record shall have power to punish, as for a criminal contempt," persons guilty of certain acts; and among others, "wilful disobedience of any process or order lawfully issued or made by it." (2 R. S. 278, sec. 10, sub. 4.) This class 632 of contempts may be punished by a fine not exceeding two hundred and fifty dollars, and by imprisonment not exceeding thirty days. This punishment may be inflicted irrespective of the consideration of any injury done to a party to the action on which the process was issued, or the order made, and is to be fixed irrespective of any such consideration. For all contempts of this character, the offending party may be

indicted, (2 R. S. 692, § 14,) as for a misdemeanor. If subsequently indicted, the court before which a conviction is had, on such indictment, is required, in forming its sentence, to 633 take into consideration the punishment before inflicted, in the proceedings as for a criminal contempt. (2 R. S. 278, § 14.) The revisors, in their notes upon this title, (tit. 2, of chap. 3, of part 3,) remark, that a "solid and obvious distinction exists between contempts, strictly such, and those offences which go by that name, but which are punished as contempts only for the purpose of enforcing some civil remedy. This distinction has been observed, and the former are intended to be included in the preceding sections. The latter class are treated 634 of subsequently, among miscellaneous proceedings in civil cases." (3 R. S. 695, foot of the page.) The statute in relation to the latter class, (2 R. S. 534, § 1,) provides, "that every court of record shall have power to punish, by fine and imprisonment, or either, any neglect or violation of duty, or any misconduct, by which the rights or remedies of a party in a cause or matter depending in such court, may be defeated, impaired, impeded, or prejudiced, in the following cases; and among others, "for disobedience of any process of such court, 635 or of any lawful order thereof, or of any lawful order of a judge of such court." It will be noted, that the expression here used, is "for disobedience" of a lawful order, omitting the word "wilful." To punish as for a criminal contempt, there must have been a "wilful disobedience." (2 R. S. 278, § 10, sub. 3.) Although the disobedience was not wilful, a party offending may be punished in the cases prescribed in 2 R. S. 534, § 1, if his neglect of duty was such that, by it, the rights or remedies of a party to a cause might be de- 636 feated, impaired, impeded or prejudiced. But although in

such a case, the disobedience might have resulted from a misapprehension of duty, or from the advice of counsel, 637 honestly given, and implicitly believed, that the act which the law adjudges to be disobedience was not prohibited, yet the disobedience may have been wilful, and have been accompanied with such acts and circumstances as would show a purpose to make the disobedience studiously offensive to the court, and to publicly manifest by it a contemptuous disregard of its order and authority. If the latter should be the true nature and character of the act of disobedience, is it to be overlooked, and are all interrogatories calling for answers 638 that might establish it, to be suppressed? The 20th section declares, that if the court adjudges the defendant to have been guilty of the misconduct alleged, and that "it was calculated to or actually did" produce certain results, "it shall proceed to impose a fine, or to imprison him, or both, as the nature of the case shall require." If actual loss has been produced, a fine shall be imposed, that will indemnify the party, and satisfy his costs and expenses, (sec. 21.) The statute is imperative, that in case of actual loss, a fine sufficient to indemnify and to satisfy costs and expenses, must be imposed. In all other cases, that is, in those cases in which no actual loss is shown, but in which it is adjudged that the act of disobedience was calculated to defeat, impair, impede, or prejudice the rights or remedies of any party, the fine shall not exceed 250 dollars over and above the costs and expenses of the proceedings, (sec. 22.) For what, it may be asked, is this fine to be imposed, in a case in which no actual loss has been sustained? and by what considerations is a court to be 640 governed in properly determining whether it shall be \$1 or

\$250? This question can be more advisedly answered on a reference to other provisions of this statute.

It will be noted that sections 21 and 22 speak only of the fine to be imposed, and nothing in relation to the imprisonment. Section 20 gives the power to fine and imprison. Sections 23 and 24 relate to the matter of imprisonment, and embrace two classes of cases. The 23d regulates the extent of the imprisonment, where the misconduct complained of consists in the omission to perform some act or duty which is 641 still in the power of the offending party to perform; and provides that, in such cases, he shall be imprisoned only until he shall have performed such act or duty, and paid such fine as shall be imposed, and the costs and expenses of the proceedings. In such a case, the order and process of commitment must specify the act to be done, and the amount of fine and expenses to be paid. If able to pay the latter, the term of his imprisonment will depend exclusively on his own volition; for when he has paid the fine and expenses, and done the act, 642 or performed the duty, it will terminate, and he will be entitled to a discharge.

In all other cases; that is, in all cases except those in which the misconduct alleged consists in the omission to perform some act or duty, which it is yet in the power of the defendant to perform, he may be punished by imprisonment, "for some reasonable time, not exceeding six months," and until the expenses of the proceedings are paid; and also, if a fine be imposed, until such fine be paid, (*ib.* § 25.) The power 643 to punish by imprisonment, conferred by section 20, so far as the imprisonment is ordered by way of punishment, is limited

by section 25 to six months ; but if the fine and expenses are not paid, it would last through life but for the act of 1843, chapter 9. This limitation of the power to imprison for a period not exceeding six months, has no connection with the imprisonment ordered to compel the payment of the fine imposed, and of the costs and expenses of the proceedings. For if the 644 power to punish by imprisonment in this class of cases, is a power to be exercised for the sole purpose of compelling payment of the fines and expenses, then it would follow—as a limit is set to the power to imprison, and the imprisonment cannot exceed six months—that at the end of that period, the offending party must be discharged from imprisonment, whether the fine and expenses are paid or not. Yet, independent of the express language of the statute, that where the punishment adjudged is merely a fine and payment of the expenses, the 645 imprisonment must continue until they are paid, it has been uniformly held that no power was competent to terminate it short of that period, and hence the act of 1843, (chap 9,) was passed, authorizing a discharge on proof of inability to do the things required. The imprisonment authorized by section 25, within the limit of six months, if imposed at all, is by way of punishment, and must be endured, even though the fine and expenses be paid the moment the decision is made. This imprisonment for a reasonable time, not exceeding six months, 646 may be imposed in every case in which the misconduct alleged calls for it, except in the cases specified in section 23. In that class of cases, the misconduct or disobedience consists in not having acted at all—in all others, in having actually done something prohibited. It may be thought singular, that, in the case of a criminal contempt, and in punishing it as such, the power to imprison should be restricted to thirty days ; and

that in proceeding to punish as for a contempt injurious to civil rights, the power to imprison for a longer period should have been conferred. Yet the revisors, in their notes to sections 23 to 25 of 2 R. S. 538, make this comment :—“ In cases of criminal contempt, by sec. 11, title 2, of chap. 3, of this part, the imprisonment is limited to thirty days. Perhaps there may be cases where a longer imprisonment for injuries to civil rights, ought to be allowed.” These three sections were enacted in the form in which they were proposed, (3 R. S. 773, 2d ed.) If, then, a fine may be imposed as a punishment, where no actual loss has been occasioned by the disobedience ; if imprisonment not exceeding six months may be ordered with the same view ; if the imprisonment, when ordered, is to be for only a reasonable period, it is obvious that some principle exists, by which the Court ought to be guided in discriminating between cases, and by which in some it may properly fine to the extent of \$250, while in others the fine should be nominal only, and by which it may determine whether imprisonment should be ordered as a punishment, and what term would be a reasonable period in any particular case. The reported cases show, that courts have regarded it as free from doubt, that the nature of the disobedience, as whether it was wilful or otherwise, was one of the matters to be regarded in determining whether any and what punishment should be inflicted beyond the imposition of a fine sufficient to indemnify an injured party for his loss and to satisfy his expenses. In *Hawley vs. Bennett*, 4 Paige, 164, the Chancellor said, “ that so far as the rights of a party have been effected by the breach of an injunction, it is no defence to the person who has been guilty of violating the same, that he did it under the advice of counsel ; although, if he has acted in good faith, it may be suf-

ficient to protect him from punishment as for a criminal contempt." In *Rogers vs. Paterson*, *ib.* 456, the Chancellor restated the principle, thus: "And the advice of counsel cannot protect a party in disobeying an order of the court, so as to prevent the adverse party, whose remedy is impaired or impeded by such disobedience, from taking the necessary steps to compel a compliance with the order; although the fact that 651 the party has acted in good faith, and under the advice of his counsel, may be sufficient to prevent the imposition of a fine beyond the actual amount of the injury sustained by the adverse party, and the necessary expences of the proceedings."

In *Sullivan vs. Judah*, 4 *ib.* 447, he said, "In this case, it is evident that the complainant has sustained no injury by the proceedings of the defendants, although they have proceeded in direct opposition to the injunction. And the excuse offered by them, is sufficient to prevent the imposition of any considerable fine as a punishment for contemning the process of the court." 652

In *Lansing vs. Eaton*, 7 *Paige*, 367, he remarked that, "The fact that the defendants acted under the erroneous advice of counsel, to whom they applied for information, how they could elude the justice of this court, and, at the same time, avoid punishment for a breach of the injunction, cannot protect them from a fine sufficient to compensate the adverse parties for the injuries they have sustained by the wrongful 653 acts complained of; though it may furnish a ground to justify the court, in refusing to inflict a further punishment upon the offenders for a violation of its order."

In the *Albany City Bank vs. Schermerhorn*, 9 *Paige*, 379, in which the Chancellor, on appeal, reversed a Vice-Chancellor's order, adjudging parties guilty of a contempt, he stated that an order of conviction should direct "to whom the fine is to be paid, or what is to be done with such fine when paid, &c. so that the order, and the process of commitment founded thereon, may show the nature of the conviction, and what the defendant is to do to entitle himself to a discharge from imprisonment." 654

In the *People ex rel. Backus vs. Spalding*, 10 *Paige*, 284, the report of the case shows that Spalding had been convicted, by a Vice-Chancellor, of a wilful breach of an injunction issued by a creditor's bill filed against him. After he had been committed, he was discharged by a Supreme Court commission, in proceedings under a habeas corpus. The Vice-Chancellor made an order for a re-commitment, on the ground 655 that the commissioner had no jurisdiction in that case to order his discharge. From the order re-committing him, Spalding appealed to the Chancellor; who affirmed the order. An appeal was taken to the court for the Correction of Errors. That court affirmed the judgment of the Chancellor.

Chief Justice Nelson, in delivering the opinion of the Court, remarked, that "the act, for which the appellant had thus been adjudged guilty, is a criminal offence under the revised statutes, and was so before at the common law, subjecting the offender 656 to indictment; and, on conviction, to fine and imprisonment." (2 R. S. 692, § 14, ib. 697; 4 Bl. Comm. 129.) "In cases confessedly criminal and indictable, the penalties for which would ordinarily go for the benefit of the people, the courts

are authorized to impose a fine, with a view to the indemnity of the party aggrieved, his acceptance of it being declared a bar to any private action for the injury. The fine, however, is no less a penalty for a criminal act, than if inflicted for the 657 benefit of the people; but the imposition of it in the way prescribed, accomplishes the double purpose of punishment for the misconduct on the one hand, and indemnity to the aggrieved party on the other." (7 Hill, 301.) In that case, the court below adjudged, that an actual loss had been occasioned by the disobedience; and although the reports of the case show that he was fined for the contempt to the amount of \$3,000, and the costs and expenses in relation to the contempt to the amount of \$196.51, it does not appear how much 658 was due on the judgment on which the creditor's bill was filed. The order of conviction directed the costs to be paid to the solicitor of the relator, and the \$3,000 to be paid to the Clerk of the Court, subject to the further order of the court. (4 How, S. C. R. (U. S.) 21.) In that case, Spalding was adjudged, on the 21st of March, 1842, to have wilfully violated the injunction. On the 7th of May, 1842, he was arrested on an *alias mittemus*; and continued under arrest until the 29th of September following, when he was discharged by 659 the Supreme Court commission, on the ground that a discharge in bankruptcy, granted on the 17th of September, relieved him from the fine, costs, and expenses, which he had been ordered to pay. In the Court for the Correction of Errors, it was contended, on behalf of Spalding, that the proceedings under which the fine had been imposed, being under the Revised Statutes, providing for the enforcement of civil remedies, should, though in form criminal, be regarded simply as another remedy for collecting the debt claimed in

the chancery suit, and upon which they had been founded; 660 that the fine was, in fact, imposed for the purpose of being applied to the extinguishment of the debt, whenever, in the progress of the suit, it should have been established, but that it was incidental to the debt, and dependant upon it; and that a discharge of the one, must necessarily discharge the other. (7 *Hill*, 302, 303.) It was in answer to this argument, that the remarks of Chief Justice Nelson, above quoted, were made. The question was not presented, nor was any suggestion made by the Court, in relation to the point, whether in any case 661 imprisonment might properly be ordered as a punishment, in addition to the imposition of a fine; nor whether a fine could be imposed merely as a punishment, in a case in which one was imposed to indemnify against actual loss. Section 22 is express, that a fine may be imposed not exceeding \$250, over and above the costs and expenses of the proceedings, even in those cases where no actual loss was occasioned by the disobedience. Such a fine, if imposed, must necessarily be imposed, merely as a punishment, and not as an indemnity; and, 662 when paid, goes to the benefit of the public, and not to the complaining party. *Macey vs. Jordan*, 2 *Hill*, 570, was an appeal to the court of last resort, from an adjudication of the Chancellor, that Macey had wilfully violated an injunction issued on a creditor's bill filed against him, and fineing him to the amount of the respondent's debt, and the costs of the proceedings. The injunction was served on the 23d of November, 1838. On the 5th of December following, Macey violated it, by making an assignment of his property. On the 6th of 663 August, 1842, he was discharged under the Bankrupt act. In October, 1843, an attachment was applied for, over a year after obtaining his discharge in bankruptcy, to arrest for the

violation of the injunction. In March, 1844, he was adjudged guilty of the contempt alleged to have been committed in December, 1838, some five years prior to the issuing of the attachment. Justice Jewett, in the opinion delivered by him, remarks, that "the cause for which the fine was imposed, 664 was the criminal contempt which the appellant was adjudged to have committed in violating the injunction." (2 R. S. 278, § 10.) The punishment for such an offence, is by fine or imprisonment, or both, according to the aggravation of the case; and where a party has suffered by the misconduct which constitutes the offence, the fine is to be paid to such party. (2 R. S. 538, § 20 to 22.) It may be true, that if the debt had been paid subsequently to the violation of the injunction, no punishment, or only a nominal one, could have been 665 imposed." \* \* \* \* \*

"The proceeding, after the attachment issued, was for a criminal offence; and although the respondent might incidentally derive a benefit from the conviction, still the proceeding was not upon the original demand, or for the recovery of the debt." The judgment of the Chancellor was affirmed, by a vote of twenty-two to two.

The views expressed of these proceedings in the cases referred, do not necessarily conflict or intimate any interpretation 666 of the statute at variance with the ordinary and natural meaning of its terms; if each opinion cited is read, as all opinions should, with reference to the particular facts of the case in which it was pronounced. They seem to show a uniform understanding of the statute, that the disobedience of an order may not have been wilful; that it may have arisen from an honest misapprehension by the offending party of the nature

of the act which he did; and may have occurred in good faith, and in the belief that it was not disobedience—that in such a case, if actual loss results from the disobedience, the court has 667 no discretion which will absolve it from imposing a fine which will indemnify the injured party for the loss. That in such a case, no fine should be imposed or imprisonment ordered, purely and solely as a punishment, beyond the punishment that may result from the imposition of a fine sufficient to indemnify against the actual loss, and to satisfy the expenses of the proceedings. That the disobedience may also have been wilful and designedly contemptuous; and in such case, the contempt is criminal, and may be punished according to the aggravation 668 of the case. The opinion is intimated by some judges that, in case the contempt is criminal, and actual loss ensues, the fine imposed should be regulated in its amount with that of the actual loss, and is to be paid to the party injured. But no opinion is intimated, that no imprisonment can be superadded in such a case, solely for the purpose of punishment.

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It seems to be clear, also, that in case of wilful disobedience, although no actual loss is suffered, a fine not exceeding \$250 may be imposed, under section twenty-two, solely as a punishment of the criminal offence; and that imprisonment may be ordered, under section twenty-five, for a reasonable period—"as the nature of the case shall require." (Section 20, *ib.*) If imprisonment cannot be ordered under section twenty-five, solely with that view, then that part of the section which prescribes the limit of six months, is nugatory; for 669 the reason, that imprisonment ordered to coerce the payment of the fine, must continue until it is paid; while this section

expressly provides, that the imprisonment shall be "until the costs and expenses of the proceedings are paid ; and also, if a fine shall be imposed, until such fine be paid ;" and this is in addition to an imprisonment ordered for some reasonable time not exceeding six months ; which, of course, must terminate when the period expires,—although the fine has not been  
670 paid, and cannot terminate before, even if it has been paid,—while the imprisonment may continue for years afterwards, and until the fine is paid ; but is continued simply because it is not paid. I admit an inability to conjecture what case may arise, in which it would be proper, in addition to imposing a fine that would indemnify the injured party, and satisfy his costs and expenses, to order an imprisonment as a punishment exceeding in duration that which the court could order, if the proceeding was one to simply punish the offender for a criminal contempt. The revisors, however, suggested that such cases might arise, and submitted sections, framed with a view to confer such power ; and the Legislature enacted the sections as proposed, and render this exposition of the views with which they were framed.

What effect the passage of the resolutions referred to in the fifth interrogatory should justly have upon the final judgment of the Court, is a question not now under consideration ; and is one in respect to which the parties should be heard, and  
672 which should be carefully considered, with all other attending circumstances before any opinion is formed. But it must be obvious, that the passage of those resolutions unexplained is pertinent to the question whether the disobedience was wilful, or was an act done in good faith, and in the honest belief that nothing prohibited by the injunction was done by the defendant

in voting for the resolutions referred to in the fourth interrogatory. If they tend to show, that the acts which are alleged to constitute a violation of the injunction were done in good faith, and in the honest belief that they did not violate it, then, 673 according to all cases, and upon principle, there should be neither fine nor imprisonment, for the purpose of punishment, if no actual loss has resulted to the relators. There should be neither fine nor imprisonment, for the very reason that the act of disobedience was not wilful, but was done in good faith and without any intention to disobey. If this be so, then it would seem to be equally incontrovertible, that if, unexplained, they tend to show that the disobedience was deliberate and designed, and that the acts done were understood as being 674 expressly prohibited by it, such a consideration cannot be overlooked in any final adjudication based on correct principles and justly adapted to the nature of the case. I should not have deemed it necessary to have examined or discussed this question so fully, were it not of the highest importance, that in every case that may arise, these proceedings should be conducted throughout on principles applicable equally to the case of all parties offending, and with a correct understanding of the meaning and object of the statute under which they 675 are prosecuted ; and that I felt it incumbent, from the confidence with which eminent counsel avowed the views they presented, to distrust the accuracy of my own previous convictions, and to consider, upon a full examination, whether they were well founded. On such examination, I cannot resist the conclusion that the fifth interrogatory is pertinent and proper ; and that it is the duty of the defendant to answer it.

## NEW-YORK SUPERIOR COURT.

SPECIAL TERM, March 12th, 1853.

Before Hon. JOHN DUER, Justice;

BOSWORTH and EMMET, J. J.

associated with him on the argument.

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The People of the State of New-York, *ex rel.*  
 Thomas E. Davis and Courtlandt Palmer,

*vs.*

677 Abraham Moore, Dudley Haley, Oscar W. Sturtevant, Jacob F. Oakley, Thomas J. Barr, William M. Tweed, Richard T. Compton, William J. Brisley, Wesley Smith, James M. Bard, Asahel A. Denman, William H. Cornell, John Doherty, William J. Peck, *Aldermen*; and Josiah M. Brown, Samuel R. Mabbatt, Timothy O'Brien, John F. Rodman, Patrick Breden, Charles H. Ring, Helmus M. Wells, Edwin Bouton, William H. Wright, Jacob H. Valentine, William McConkey, Joseph Rogers, Thomas Wheelan, *Assistant Aldermen of the City and County of New-York.*

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678 OPINIONS OF THE COURT, upon the final motions that the defendants be punished for their misconduct, in disobeying an injunction order, granted by Hon. WILLIAM W. CAMPBELL, Justice, in an action wherein Thomas E. Davis and Courtlandt Palmer, are plaintiffs; and the Mayor, Aldermen and Commonalty of the City of New-York, are defendants.

## OPINION OF DUER, JUSTICE.

We are now to determine whether the members of the Common Council, who have been severally brought before us by a process of attachment, have been guilty of the misconduct that is alleged against them? and if so, whether this misconduct has operated, or was calculated "to defeat, impair, impede, or prejudice the rights or remedies" of the relators in the prosecution of their original and pending suit? (2 R. S. sec. 20, p. 538.) These are not the only questions that we have found it necessary to consider and decide; but they are the first in the order of the judgment now to be pronounced.

The misconduct that is alleged against all the defendants in the affidavits upon which the motions for the attachments 680 were founded, and in the interrogatories that have since been filed, is that of a contempt of the authority of this court, by an act of positive disobedience to its lawful order; and the Aldermen, who are before us, with the exception of Alderman Doherty, are also charged with having given their assent, by their votes, to the passage of certain resolutions, not only denouncing the order, which they were required to obey, as an unprecedented act of usurped authority, but containing scandalous imputations upon the conduct and motives of the Judge 681 by whom the order was issued. These resolutions are set forth at large in the proceedings; and it has been insisted, that they are evidence, not merely in support of the principal charge, but of a distinct and substantive offence, which may and ought to be treated as a wilful and criminal contempt.

It is manifest, that we cannot do otherwise than adjudge each of the defendants to have been guilty of the alleged contempt, by his personal refusal to obey the order of the 682 injunction which has been so publicly violated, if we adhere to the opinion that the order was rightfully issued and properly served, and individually binding ; and upon these questions, it is only necessary now to say, that the convictions which we fully entertained, and have endeavored fully to express, are wholly unchanged—they have not been weakened, but confirmed by subsequent reflection and research. We have held, and now hold, that the order of injunction commanded each individual member of the Common Council to refrain from 683 aiding or assisting in the performance of the corporate act which the order prohibited ; and consequently, that it was violated by every member who voted for the resolution in favor of Jacob Sharp and his associates ; with the intent, that the grant which the resolution contained should become, by its immediate acceptance, operative and effectual. Each of the defendants in his answer to the fourth interrogatory, has admitted that he voted for this resolution—nor has one of them attempted to deny that he so voted, with the intent that the 684 resolution should take effect as an immediate and positive grant, and in the confident expectation, that by the acceptance of the grantees, it would become so. The meaning and motives of the entire transaction, are indeed too apparent to admit of doubt or denial. It is evident from the papers before us, that the written acceptance of the grantees must have been prepared and signed before the resolution was finally adopted ; since, as soon as the anticipated final vote was taken, it was delivered and filed.

Nor is any argument requisite to show that the misconduct 685 of the defendants in violating the injunction, has tended to impede or prejudice the rights and remedies of the relators in the prosecution of their suit. Such was not merely its tendency and design, but such has been its actual effect. If the grant forbidden by the injunction had not been made, all the relief that the relators seek might be obtained in the present suit. The grant to Jacob Sharp and his associates, has altered in some degree, the nature of the relief to which the relators may be entitled. A decree, not merely prohibiting, but vacating the 686 grant must now be sought; and hence the grantees are necessary parties in the further prosecution of the suit. They are now the real parties in interest; and consequently, a final decree affecting their rights as such, cannot be made until they shall have been brought in as defendants by a supplemental complaint. The necessity of a proceeding which impedes, and by the expense and delay which it creates, prejudices the remedy of the relators as plaintiffs in the suit, has arisen solely from the misconduct of the defendants now before us. 687

Reserving for separate consideration, the resolutions passed by the Board of Aldermen, it follows from the observations that have now been made, that each of the defendants, by violating the order of injunction, has been guilty of the misconduct alleged against him; and which, as a contempt of the court, I am required to punish. Such accordingly, in relation to each of them, is the judgment that I now pronounce. The statute applicable to the case makes it the duty of the court, when 688 the alleged misconduct of a defendant prosecuted for contempt, and its effects or tendency have been proved to its

satisfaction, to impose upon him the penalty of a fine or imprisonment, or both, in its discretion, and as the nature of the case may require. (2 R. S. p. 538, sec. 20.) When the guilt is proved, a penalty must follow ; but the discretion of the court, in fixing the penalty, must be exercised within certain limits, both in respect to the amount of the fine, and the 689 duration of the imprisonment that may be imposed ; and that discretion, it must also be observed, is not arbitrary, but judicial ; and its exercise must therefore be governed by those considerations by which alone the mind of a judge may reasonably and justly be influenced. Such is the meaning of the statute in directing that the penalty must be such as the " nature of the case may require."

What, then, is the penalty that the nature of this case, it may justly be said, requires us to impose ? What the measure 690 of punishment with which the misconduct of the defendants, in their public disobedience to a positive and most intelligible order of the court, ought to be visited ? Banishing from our minds all extraneous and personal considerations, and fixing our attention alone upon those which arise upon the evidence, and which mark the character and throw light upon the motives of the transaction, what is the answer that these questions ought to receive ? I shall proceed to the answer that we 691 deem to be appropriate and necessary ; and state the conclusions at which we have arrived as the judgment of my associates, as well as my own ;—and it is due to the public and to the defendants, that the reasons by which we have been governed in forming our judgment, shall be fully explained. This is one of the occasions on which the interests of truth

and justice require, that the judgment of the court shall not merely be declared, but vindicated.

Had it been proved that the relators had sustained an actual loss from the misconduct of the defendants, we should have had no discretion as to the amount of the fine to be imposed. 692 They would then have been entitled to a full indemnity over and above their costs and expenses ; and, consequently, a fine which, equally divided among the defendants, would have secured that indemnity, must have been imposed. (2 R. S. p. 538, sec. 21.) But we think that no evidence has been given of an actual loss, for which a definite sum as a compensation may be awarded ; and it is only to such losses—losses pecuniary in their nature, and the amount of which may be estimated with certainty—that the provisions of the statute 693 can, in our opinion, be held to apply. The relators, therefore, are entitled only to their costs and expenses.

In cases in which the defendant is adjudged to have been guilty of the alleged contempt, but no loss, beyond his costs and expenses, to which in all cases he is entitled, is shown to have resulted to the prosecuting party, the court may impose a fine not exceeding \$250, and imprison the defendant for a period not exceeding six months ; or, in the exercise of its discretion, may inflict either penalty in its full or a limited 694 extent, (R. S. *id. est. secs. 22, 23, 25.*) But we are clear in the opinion, that in those cases no penalty whatever, beyond the costs and expenses of the prosecution, ought to be imposed ; unless it appears that the misconduct, as proved, was, in its nature, a criminal contempt ; which, as such, the court, for

the sake of a public example, and the necessary maintenance of its own rights and authority, is bound to punish; and such, we apprehend, is the settled construction of the statute.

695 Hence, in all these cases, the first necessary inquiry is, whether the alleged contempt was wilful and intentional; or accidental and undesigned? the result of pardonable ignorance, error or inadvertence; or a deliberate act of conscious disobedience? And when the disobedience is shown to have been intentional, and the question of a fitting penalty is alone to be determined, all the circumstances by which the offence was palliated or aggravated, must be considered, in determining the measure of its punishment; and in the discharge of this 696 duty, the answers of the defendants to the interrogatories demand special attention; whether the language is that of regret and apology, or of contumacy and defiance, is a material inquiry.

These views have been present to our minds, in examining the cases now before us; and we lament to say, that we have been unable to resist the conviction that the disobedience of the defendants, each and all of them, to the order of injunction, was not the result of accident or inadvertence, but was 697 intentional, deliberate and wilful. I mean "wilful," in the sense of a determination to do what is known to be forbidden. In the plainest terms, the order forbade them to grant a certain privilege to Jacob Sharp and his associates—and with a full knowledge of the order, its import and object, this very grant they made. The resolution which they adopted, was this grant; and hence they could not for a moment have doubted, that an order forbidding them to make the grant,

forbade them to pass the resolution. Whether they acted in 698 the belief that their disobedience to the order could be justified, is a different question; but such a defence is itself an admission that they fully understood the mandate which they were resolved to violate. We desire to put as favorable a construction upon the conduct of the defendants as it can possibly bear; but, to our mind, there is no escape from the conclusion that they have intentionally and knowingly done the act which the order of this court commanded them not to do.

Nor let it be said, that, in stating this as our undoubting 699 conviction, we disregard and reject, as unworthy of credit, the declaration made by each of the defendants, in his answer to the fourth interrogatory, namely: that "he believed that the injunction did not purport nor mean to restrain them from voting in favor of the resolution" making the grant which was prohibited; for although we are forced to regard this declaration as ambiguous and evasive, it is not necessary to reject it as wholly untrue. It admits of an interpretation which may reconcile it with the conviction we have expressed; while, if 700 understood in the obvious sense which the words seem intended to suggest, it cannot be reconciled with the public acts and declarations of the Board of Aldermen, at the very time to which this declaration, in their answers, refers. And were we reduced to the painful necessity of an election, it is to contemporaneous declarations, made for the very purpose of explaining and vindicating this act of disobedience to the process of the court, that our confidence and credit would in preference be given. The resolutions introduced by Alderman Sturtevant, 701 and voted for by all the Aldermen, with one exception, who are now before us, are conclusive evidence that the order of

injunction was then understood by them in the very sense that we have given to it ; and that, thus understanding, they meant to violate it. These resolutions denounced the order of injunction as an illegal restraint upon the legislative action of the Common Council ; and upon that ground, proclaimed a determination utterly to disregard it. But if the injunction was  
702 then understood by them, as neither prohibiting nor meaning to restrain the members of the Common Council from voting for the resolution in favor of J. Sharp and his associates, with the intention that the resolution, when adopted, should operate as a grant, it imposed no restraint whatever upon their legislative action ; nor by their voting as they did, was it at all disregarded. Indeed, upon this construction, the Common Council, as such, could not disregard it. It is painful, but necessary, to state the alternative. Either the injunction,  
703 when served, was understood by Alderman Sturtevant, and those who acted with him, as restraining them from voting in favor of the resolution making the grant it prohibited, or it was not. If it was, then the declaration they have now made, in its obvious sense, asserts the existence of a belief which they never entertained. If it was not, then his resolutions vindicating the rights and dignity of the Common Council, were based upon an assertion, which he, and those who voted with him, then believed to be false ; and were consequently, a  
704 most gratuitous, as well as intemperate attack upon the conduct and motives of the judge by whom the injunction was issued. And upon this supposition, the passage of the resolutions was a malicious and wanton insult—a contempt, as criminal and aggravated in its nature, as a court of justice has ever been bound to notice, or compelled to punish.

But this supposition we do not hesitate to reject; for although the resolutions of Alderman Sturtevant may convey imputations, and be expressed in terms that render them justly liable to animadversion and censure, yet we do not at all doubt that the injunction was regarded, not only by those who 705 voted for those resolutions, but by every member of the Common Council, as restraining their legislative action, by enjoining them not to adopt, by their votes, the grant which it described and prohibited. It is manifest, however, that if Alderman Sturtevant, and the Aldermen who voted with him, acted in this belief, the credit of their veracity can only be saved by construing their present declaration, not in its obvious, but in a very qualified sense; and it is this qualified and charitable interpretation, therefore, that we adopt. The order of 706 injunction commanded the Corporation and its members to desist and refrain from making a certain grant; but did not command the members of the Common Council not to vote in favor of the resolution they were about to re-consider, unless the intended and necessary effect of its adoption was to make the grant that was forbidden. Such, however, was not its necessary effect; since, when they voted for the resolution, they might, at the same time, have suspended its effect, as a 707 grant, until the injunction was dissolved, or until the happening of that event have forbidden the acceptance of the resolution by the grantees, or the filing of that acceptance by their own clerk; and had either of these courses been followed, there would have been no intentional breach of the injunction —no conflict between the Common Council and the judiciary would have ensued,—the city would have been saved from the disgrace of the unseemly spectacle that we now witness; and the Judges of this Court have been relieved from the dis- 708

charge of a most painful duty. Why a course of proceeding, by which all these consequences would have been avoided, was not, in fact, adopted, it is unnecessary, and would be irrelevant now to inquire. We are, however, told by the Assistant Aldermen, that they not only believed, but were advised by counsel, that the injunction did not purport nor mean to restrain them from voting for the resolution which they re-considered and adopted; but we are bound to presume, that  
709 this advice was given, and was understood to be given in the belief that one or the other of the courses that we have indicated would be followed—in other words, that although the resolution might be passed, its effect as a grant would be suspended; since we find it impossible to believe that any counsel could have advised them, that if they adopted the resolution so as to render it effectual as a grant, the injunction would not be violated. No counsel could have advised them that the injunction would not be broken, if they made the grant,  
710 which, in plain words, it commanded and enjoined them to desist from making. While upon this subject, we deem it necessary to observe, that the advice of counsel, when stated in general terms, as it here is, will never be accepted by this court as excusing or palliating a contempt which is otherwise manifest or proved. The advice, when thus stated, will never be permitted to affect our decision. To enable us to regard it at all, the names of the counsel must be given; and the information that was laid before them, and the exact import of their advice be fully stated. If the advice was written, the  
711 writing must be produced—if oral, the fact that it was given, and its precise import must be verified by the affidavits of the counsel who gave it. The propriety of these rules, and the necessity of adhering to them, will be doubted by none who

have any knowledge of the difficulties that beset a court in the due administration of its justice, and of the means too frequently employed, by a suppression of truth, to evade its authority. The result of our observations upon that part of this case which we have now considered, is, that we cannot regard the declaration of the defendants in their answers to the fourth interrogatory, that they "believed that the injunction did not purport nor mean to restrain them from voting" as they did, as meaning that they were led to disobey the positive order of the court, by their ignorance and mistake as to its true import; but simply, that the injunction did not prohibit the naked act of voting for the resolution in favor of J. Sharp and his associates; if by so voting, no effect was given to the resolution as a grant. It is true, that the declaration thus construed is irrelevant and evasive; but it is better that we should censure it as evasive, than be forced to reject it as untrue. We cannot believe that there is any one of the defendants who have been attached, were the direct question now put to him, whether he believed that the object of the injunction was to prevent them from adopting, as a grant, the resolution they were to re-consider? who would give any other than an affirmative reply. It is indeed manifest, that unless such was its meaning and object, it had none whatever. It was inoperative and senseless.

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Passing then from that which we deem a necessary conclusion, that the defendants knew what the injunction meant, and meant themselves to disobey it, we are next to consider whether any reasons have been alleged that should induce the court to mitigate; or, so far as our discretion may allow, remit the penalty that otherwise it would be our duty to impose.

The only reason that has been alleged, that we deem it at all necessary to notice, is, that the defendants fully and sincerely believed that this court had no jurisdiction to issue the injunction; and consequently, that they were under no obligation to obey it. That, as a court of equity, we possess the jurisdiction, we have already decided; but it has been contended that, conceding our jurisdiction, the opposite belief of the defendants should induce us, so far as we can, to exempt them from the punishment their disobedience might otherwise have merited; since, if intentional, it was conscientious and the result of a pardonable error. The answers of the Assistant Aldermen contain no averment of their past belief in our want of jurisdiction; but as they now deny it, we presume that the omission was accidental, and shall give them all the benefit to which the excuse, had it been made, would entitle them.

Our first observation here is, that the averment of the defendants' belief in our want of jurisdiction, is plainly immaterial; unless the meaning is, that this belief was the motive of their conduct. It is manifest that a belief, which had no influence upon their action, can never be permitted to define its character. The fact that we have no jurisdiction would be a complete defence; but the erroneous belief can be no excuse for an act of disobedience with which it was wholly unconnected. To set up the excuse, therefore, is to admit that the disobedience was intentional.

We next observe, that it is not alleged that this belief of the defendants, however sincere and conscientious it may have been, was founded at all upon the advice of counsel; still less

is it pretended that, upon this ground, they were advised by counsel to "disregard utterly" the order of injunction. For 718 aught that appears, or we are at liberty to intend, it was the advice of Alderman Sturtevant alone that was given and followed. Had the fact been otherwise, it was so material, we must believe it would have been stated.

Under these circumstances, we are constrained to say, that the alleged belief of the defendants, that the injunction which they were required to obey was illegal and void, furnishes a very slight, if any excuse for the course which they followed. Upon so grave an occasion, to act upon their own belief, to 719 use the mildest words, was the extreme of indiscretion and rashness. The public disobedience of the Common Council of this city to the positive mandate of a court of general jurisdiction; and possessing, we trust, the entire confidence of the public, was an act of no trivial importance. The history of our country, we believe, affords no instance of a similar resistance to judicial authority; viewed in its possible consequences, it was calculated, as an example of disrespect and insubordination, to affect widely the peace and good order of 720 society; and, from the conflict which it threatened, even to impair the confidence of all reflecting men in the stability of our institutions. To venture upon such an act, was to assume a deep responsibility—a responsibility, that should never have been assumed; unless upon the fullest deliberation, the best advice, and the pressure of a stringent and imperious necessity; yet this responsibility was assumed and the act performed without deliberation, without advice, and without necessity. The supposition that there was any necessity for immediate 721 action, is plainly groundless; we have already shown that

the resolution which the defendants, notwithstanding the objections of the Mayor, were determined to adopt, might have been adopted, had its operation as a grant been suspended, without violating the injunction ; but, were it otherwise, what reason had they to doubt that a measure, which they believed to be recommended and justified by the strongest reasons of public utility, would be rejected by their successors ? And if they were confident in their opinion, that the injunction which they were required to obey, was issued without authority, what reason had they to doubt that, upon application to the court, it would be promptly dissolved ?

In the opinion that I gave, in granting the motion for an attachment, I said, that "if the order of injunction was issued without rightful authority, the members of the Common Council, in the just maintenance of their own rights, were bound to disregard it ;" and this language has been quoted upon the present argument ; but I added language that was not quoted, that "if this court, upon any ground, possessed the jurisdiction that was denied, it was *at their own peril* that the members of the Common Council refused to submit to its exercise." It is this language, that I now repeat. He who resists the order or process of a Court of Justice, trusting to his own belief of its want of jurisdiction, acts in all cases at his own peril ; and when he is proved to be mistaken, is, in all cases, justly punished. And I add, that it is upon this principle alone, that the supremacy of the law, and the just authority of Courts of Justice can be maintained.

An unconstitutional law has no force ; it creates no duty of obedience ; but he who resists a law, because he thinks it un-

constitutional, may be involved by his mistake in the guilt, and incur the penalty of treason. Resistance to a law, and disobedience to the process of a court, stand upon the same ground; and every citizen is bound to know that his private conviction, if erroneous, that the law or the process is void, will never be admitted as a justification, and very rarely as an 725 excuse. His only safe course is to obey, knowing that if wronged by his obedience, the law will afford him a full redress.

I have no right, and do not mean to draw in question the sincerity of the belief the defendants have avowed, and under which they claim to have acted; yet it is not a little singular that this belief was entertained, since there are several cases in which the jurisdiction that is now denied, has been exercised; and its exercise, although questioned, submitted to by the Common Council. I refer, without dwelling upon 726 them, to the case of Lawrence v. The Mayor and Corporation, (2 Barb. 577;) to that of Brower v. The Corporation, (3 Barb. p. 254;) and to a more recent case, which, I believe, has not yet been reported, that of Christopher and Tilton v. The Corporation and others, the well known Washington market case. In each of these cases, the objection to the jurisdiction of the court, upon the ground that the injunction prayed for was an illegal interference with the legislative action of the Common Council, was distinctly raised; in each, it was de- 727 cisively overruled; and in each, the judgment, as I understand, was acquiesced in by the Corporation. In the last case, Judge ROOSEVELT maintained the jurisdiction of the Supreme Court, as a Court of Equity, upon the broad principle that "corporate property, and corporate credit are a trust fund;

and corporate powers of taxation, *trust powers*; and a threatened misapplication of the one, or misuse of the other, is a *breach of trust*, which a Court of Equity has the power, and in cases of sufficient magnitude and aggravation, is bound to 728 restrain." Such are the words of that learned Judge; and, most strikingly, are they applicable to the actual case which the relators have set forth in their complaint. It is true, that the effect of the injunction, in the cases I have cited, was to restrain, not the passage but the execution of an ordinance; but this distinction does not at all effect the question of *jurisdiction*. To restrain the execution of an ordinance, is to declare its nullity; and a decree annulling an ordinance, is just as plainly an interference with the legislative *discretion* 729 of the Common Council, as an injunction prohibiting its adoption. The power of the Court of Equity to annul, and its power to restrain, I apprehend, are co-extensive; and hence it will be found, that in every case in which the court has refused to interfere by an injunction with the exercise of a discretionary power, the refusal has proceeded upon the ground, that the act sought to be restrained, would be valid if performed. Had it been admitted or proved to the satisfaction of the court, that the contemplated act would be an excess of 730 authority, a breach of trust or a fraud, the injunction would have issued. A court of justice, it must be admitted, cannot restrain the passage of an act of the legislature, which, when passed, it may declare, as unconstitutional, to be void; but the Common Council is not a legislature created by the constitution as a co-ordinate branch of the government; and as such, in the discharge of all its duties, wholly exempt from judicial control; and the supposition that such is its character, and such its privileges, is a grievous and pernicious error. Nor

is this all ; a case still more remarkable in its circumstances, has occurred during the past year in this court, which, it 731 seems indeed strange, should not have been remembered. I refer to the case of Pettigrew and Sherman v. The Corporation and others ; a suit, which arose out of the controversy in relation to the Eighth Avenue rail road. The injunction, in this case, was granted by Chief Justice Oakley ; and, in its tenor, resembled that which the Common Council have now refused to obey. It commanded the Corporation to desist and refrain from making and executing any contract or grant, securing to any other persons than the plaintiffs, the right or privilege of 732 constructing the rail road in question. It was construed by the Common Council, as restraining their legislative action upon an ordinance which the Mayor had returned with his objections to its passage ; and, upon the ground that such was its construction and force, so far from disputing its validity, and denouncing it as an invasion of their rights and privileges, they made a special application to the court by their counsel, to be released, by an alteration in the words of the injunction, from the duty of obeying it.

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It is true, it was held by the court that the application was needless, and that the injunction did not impose the command which the Assistant Aldermen feared to violate ; but the ground of our opinion was, that the ordinance which they wished to re-consider, was not the grant or contract which the injunction forbade to be executed ; but contained an express provision, that the permission which it gave of constructing a rail road, should not take effect until a sufficient agreement between the 734 grantees and the corporation, to be drawn and prepared by the counsel of the latter, should be signed and executed. The ap-

plication, however, was still pressed; and would doubtless have been granted, had not the counsel for the plaintiffs given a written stipulation that they would not insist upon that construction of the order of the court, which, it was feared, would be adopted and enforced

It was in August or September last, that these proceedings took place.

Remembering these facts, I pass with much regret at the 735 necessity, which my duty imposes, to the resolutions and preamble which were introduced by Alderman Sturtevant, and adopted by the votes of all the Aldermen with the exception of Alderman Doherty, who are now before us. These resolutions and preamble, from the terms in which they are expressed, and the imputations which they plainly convey, are regarded by all of us, not merely as an aggravation of the contempt of wilful disobedience to the order of injunction, but as constituting, in themselves, a distinct and very serious offence, which 736 we might well have been required to punish as a wilful contempt, even had our own convictions forced us to disclaim our jurisdiction. We cannot give to them the favorable interpretation that we were urged to adopt. We cannot regard them as merely vindicating the rights and dignity of the Common Council, in terms, it is true, not well chosen and somewhat passionate, but implying no disrespect or insult to the Judge who granted the injunction, nor conveying the slightest imputation upon his integrity and motives.

737 The preamble commences with saying that the Judge had issued the injunction without "any color of law, or justifica-

tion ;"—words which have not merely been demonstrated to be untrue, but which, if they do not necessarily imply a charge of positive corruption, certainly do of the grossest ignorance. The preamble proceeds to say, that as the injunction was issued at the close of a session, and threw forward the period of showing cause against its continuance beyond the expiration of the session, and this, in regard to a measure that had long been pending, it bore "upon its face a character of indirection," (in other words, trick and dishonesty,) "not less unjustifiable, and *not less unworthy of the judiciary,*" than its usurpation of authority and jurisdiction. As the indirection here charged is declared to be "unworthy of the judiciary," it is to the Judge who issued the injunction bearing this character, that the dishonesty, which the term implies, is meant to be imputed. We forbear from any further analysis or comments. The plain meaning of the preamble and resolutions, is this: that the plaintiffs, knowing that they had no right to maintain their suit, and could not, by fair means, defeat the measure to which they were opposed, resorted to those which were indirect, and unfair; and that the Judge, who, without a color of law, issued the injunction, by continuing it in force beyond the expiration of a session which was about to close, lent himself to their fraudulent design. The publication of resolutions bearing this interpretation, we cannot but regard as a direct and very dangerous interference with the administration and course of justice. It was calculated to prejudice the public mind in relation to the merits of a pending suit; to destroy all confidence in the integrity of a Judge, whose probity had never been impeached; to intimidate his brethren from giving their sanction to his act; and to degrade, in public estimation, the entire tribunal to which he belonged. It re-

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741 mains only to add, that neither the author of these resolutions, nor any of those who consented to their passage, with the exception of Alderman Wesley Smith, has chosen, in his answer to the interrogatories, to utter a single word of apology,—a solitary expression of regret. I close with a few general observations, which the novelty and the importance of the case seem to require, and certainly justify.

We are proud, and justly proud, of our democratic institutions; and rejoice that our country, a country in which the legal distinctions of rank are wholly unknown, and the people alone is sovereign, exhibits a spectacle of peace, security and order:—a wide-spread scene of human happiness, such as no other country or age has been privileged to witness. But we shall greatly err, if we attribute the multiplied blessings we 742 enjoy, our unexampled progress, and unexampled prosperity, solely to the nature and form of our peculiar institutions. The experience of other countries in past ages, and in the present, might well convince us that the institutions in which we glory, would be prolific sources of confusion, discord, and misery, were the disposition and habits of the American people, resulting from a long course of training and discipline, materially changed; nor is there any hazard in saying, that it is to the peculiar, the distinctive character of the American people, 743 that the admirable and successful working of our peculiar institutions, is mainly and eminently due. There are certain great truths that have been long and deeply impressed upon our minds and consciences; and it is the constant influence and moral efficacy of these truths, as controlling our actions in all the relations of life, public and private, that has formed our national character—the character from which our institu-

tions derive their vitality, and to which [they owe their success. These vital, governing truths, are—that Liberty and Order are inseparable—and that the freedom which is not defined and restrained by law; and consciously, willingly, and wholly subject to its dominion, is sure to degenerate into license, proceed to anarchy, and end in despotism. Our country is great, flourishing, and prosperous, because the people has, at all times, in the exercise of its own sovereignty, been accustomed, and has rejoiced to confess the sovereignty of the law, as limiting and controlling its own. It is so, because we long have been, still are, and, I trust will ever remain, a law-reverencing, law-obeying, and law-abiding people. 744 But it is manifest, that this deep reverence for the law—this prompt and cheerful submission to its dictates—this fixed resolve to abide its determinations—are inseparably connected with the confidence which is reposed in those by whom the law is administered; and can, in reality, subsist no longer than while that confidence is felt and maintained. Hence, none are more dangerous enemies to our country and its institutions, by whatever pretext they may seek to veil their conduct, than those who seek to destroy or impair this necessary 745 confidence, by rash denunciation, groundless imputations, open disrespect, and public disobedience. The inevitable tendency of such proceedings, is to weaken and unsettle our government in its very foundations, and in every branch of its administration. They strike at the root of our national prosperity, and poison and corrupt the fountain from which all our blessings flow—the supremacy of the law—manifested and sustained by the ready submission of all to its dictates and authority.

The Judge then proceeded to pronounce the sentence of the Court.

747 I have no doubt that the sentence that we are about to pronounce, will be thought by many far more lenient than the nature of the case, and the observations that I have made, would justify. But there are many circumstances which have induced us to think, in the existing state of public opinion, that it is far better to err upon the side of moderation than upon that of severity. The most aggravated case, is that of Alderman Sturtevant; he was the author of these resolutions.

748 His framing and preparing these resolutions, was a deliberate act. Their adoption by his brethren, might have been the result of haste and passion. His case, therefore, must be distinguished from the others. The sentence as to Alderman Sturtevant is, that he shall be imprisoned in the City Prison for the term of fifteen days; and he shall pay to the city treasury, a fine of \$250; and to the relators, for their costs and expenses, \$102.07.

In relation to each of the Aldermen who voted for the resolution of Alderman Sturtevant—with the exception of Alderman Wesley Smith, who, in suitable terms, has expressed his regret, and has made, what we deem, a sufficient apology—we impose upon each of them, a fine of \$250; in addition to the sum of \$101.51 for the costs and expenses of the relators, to be paid to them. Alderman Doherty voted against the resolutions; and Alderman Smith has very properly submitted himself to the judgment of the Court, by a concession of his error. Upon each of them, therefore, as well as upon each of

749 750 the Assistant Aldermen who laid the resolutions upon the table, we impose a fine of \$100, to be paid to the treasury of the city; in addition to the sum of \$101.51, for the costs and expenses of the relators. In each of these cases, a warrant will be issued, committing the parties to prison until the fine that has been imposed, is paid.

## BOSWORTH, J.—

This proceeding has reached that stage, at which it becomes the duty of the Court to decide whether the defendant is guilty of the misconduct alleged against him; and if it determines 751 that he is, to also decide what the punishment shall be.

Although this is, in fact, a proceeding at Special Term, yet having, in connection with my brother Emmet, sat with the Judge before whom the proceeding is pending,—not merely to assist him by acting advisorily, but upon the understanding that the counsel of neither party expects the questions that have been argued here will be re-argued on any appeal that may be taken to the General Term, but that the final determination to be made at the Special Term will be passed upon 752 at the General Term, without further argument,—I deem it due to the position in which I am placed, with respect to this proceeding, and to the parties who may be affected by the decision, to state the conclusions at which I have arrived, and the reasons on which they are founded.

The complaint, which was duly verified, prayed for an injunction, restraining; and, on such complaint, an order was made by a Judge of this Court, “commanding and strictly enjoining the defendants (therein,) the Mayor, Aldermen and 753 Commonalty of the City of New-York; their counsellors,

attorneys, solicitors, and agents, and all others acting in aid or assistance of them, and each and every of them," to "absolutely desist and refrain from granting to, or in any manner authorizing Jacob Sharpe and others," (the persons named in the resolution, a copy of which was annexed to the complaint, and marked B.) or their associates, or any other person or persons, whomsoever, the right, liberty, or privilege of laying 754 a double, or any track for a railway in the street known as Broadway, in said City of New-York, from the South Ferry to Fifty-seventh street, or any railway, whatever in Broadway; and from breaking or removing the pavement in said street, or in any other manner obstructing said street, preparatory to, or for the purpose of laying or establishing any railway therein, until the further order of this Court in the premises."

The injunction order was granted on the 27th of December, 1852, in an action in this court, in which the relators were 755 plaintiffs, and recited, that it *appeared* (to the Judge who granted it,) from the complaint in that action duly verified, that the plaintiffs were entitled to the relief demanded in the complaint; and that such relief consisted in restraining the defendants, as hereinbefore stated.

Before the alleged disobedience of the injunction, a copy of the summons and complaint, and the injunction itself, were duly served on the Mayor of the city. The injunction was served also on each member of the Common Council, the defendant being one, by exhibiting to each member personally, the injunction itself, and delivering to and leaving with him a

copy of it ; and such service was made prior to the alleged disobedience.

On the 29th of December, after such service had been made, the Board of Aldermen, by the votes of a majority of its members, (the defendant being one who so voted,) passed a resolution, granting to Jacob Sharpe and others, the authority and consent of the Common Council to lay a double track for a railway in Broadway, and transmitted the same to the Board 757 of Assistant Aldermen for their concurrence. The latter body passed them on the 30th of December ; and, on the same day, the grantees formally accepted of the grant. This resolution had been previously vetoed by the Mayor ; and was adopted by both Boards of the Common Council, notwithstanding the objections of the Mayor, and in disregard of the injunction.

A copy of this resolution, as adopted, was annexed to the complaint, which alleged that the members of the Common 758 Council avowed a purpose to pass it, and were continuing their session by adjournments from day to day, for the purpose of passing it ; and that the persons named as grantees in the resolution, avowed a purpose to accept the grant as soon as made ; and to immediately proceed, under the authority conferred by it, to tear up the pavement, and construct a railway in Broadway.

Immediately after the passage of this resolution by the Board of Aldermen, the defendant introduced before that body 759 a certain preamble and resolutions, (a copy of which is an-

nected to the interrogatories filed on this proceeding, and marked C.;) and on his motion, it was adopted by the votes of a majority of that body, including his own. The defendant, in his answer to the interrogatory put to him, states that, at the time of voting for the resolution creating the grant, he did "believe that the said injunction did not purport, and did not mean to restrain him from voting in favor of the said

760 resolution."

The preamble to the resolutions introduced by him immediately thereafter, and adopted on his motion, recites that the Judge who made the order, had granted it "without color of law or justification;" and had assumed the prerogative of directing and controlling the municipal legislation of the city, by prohibiting the defendants therein, "from performing a legislative act;" that said injunction "bears on its face, a character of indirection, not less unjustifiable, and not less

761 *unworthy* of the judiciary, than the *usurpation* of authority and jurisdiction which is contained in such an attempted injunction itself;" "that if such a precedent of unwarranted and *unwarrantable* interference with the rightful functions, powers and duties of a legislative body, attempted by a Judge, be submitted to or tolerated without a *just rebuke*," the consequences subsequently recited might follow; and that the reasons alleged for the injunction, are equally "untenable in law and unfounded in facts."

762 The first of the resolutions annexed to the preamble, declared that "it is the duty of the Common Council, on this unprecedented occasion, to protect its own dignity and the rights of the people of the city of New-York, and its constitu-

ency, by utterly *disregarding* the said injunction on its legislative action, and *declaring* its sense of the same.

The second of such resolutions declared "that the Common Council have an equal authority and right to suspect and impute *improper motives* to any intended judicial decision of any Judge, and consequently to attempt to *arrest his action on the bench*, as such Judge has in regard to the legislative action of the Common Council."

No regret is now expressed, either for having disregarded the injunction, or for having introduced or voted for the resolutions in relation to it and the action of the Judge who granted it; but it is expressly stated in answer to the fifth interrogatory, that he then believed and still believes "that the court had no jurisdiction to grant the injunction; and believing that it is the right of every citizen to question and resist the exercise of illegal power," he voted for the resolutions, under the influence of the various considerations stated in his answer to that interrogatory.

It seems to be too clear to admit of doubt, that he voted for the resolution creating the grant, with the intent to have the resolution become absolute and effectual as a grant, so far as the Common Council were competent by any action on their part to make it absolute and effectual; and with the expectation, that the grantees would accept it, as provided by the terms of the resolution. They did so accept it.

This act of the defendant was a clear and palpable violation of the injunction. (*Ross v. Clussman*, 3 Sand. S. C. R. 676.)

It seems impossible to deny, after reading the preamble and resolutions subsequently adopted, that the injunction was understood at the time as prohibiting by its terms, the passage of the resolution creating the grant, with the intent to have it accepted and become effectual. That was the very resolution  
 766 which the complaint alleged the Common Council avowed a purpose to pass; and the attempt to restrain its passage by injunction, was the alleged assumption of power which was denounced; and as to which, they declared it was due to their own dignity, and the people, that they should protect them "by utterly disregarding the said injunction upon its legislative action."

There would seem to be no grounds presented, on which the court is at liberty to draw the more agreeable and charitable conclusion, that the disobedience was unintentional; or  
 767 was an act done in good faith, and believed to not come within the letter or spirit of the prohibition.

If it be true, as the defendant avers in his answer to the fourth interrogatory, that, at the time of voting for the resolution creating the grant, he verily believed the injunction "did not purport, and did not mean to restrain him from voting in favor of the said resolution;" then the censorious resolutions and preamble introduced by him, and adopted on his motion,  
 768 have not even the poor apology of momentary indignation, excited by a supposed usurpation of power.

If it be true, that he believed it did not purport, and did not mean to restrain him from giving the vote which he gave, and with the intent with which it was given; then it could not

have been understood by him as interfering with any legislative or other act, done by him as a member of the Common Council, with reference to the subject matter of this action.

If that was his sincere belief, then there was nothing to suggest the idea "that it was the duty of the Common Council on that unprecedented occasion, to protect its own dignity, and the rights of the people of the city of New-York, by utterly disregarding the said injunction on its legislative action, and declaring its sense of the same." 769

If such was his sincere belief, then in his judgment, no legislative action contemplated or taken by him, had been enjoined. No vote which he intended to give, or subsequently gave, had been prohibited. There had been no attempt to control the legislative action of the Council; but on the contrary, each member was left entirely free to vote as he pleased, and whenever it might suit his pleasure. But the unmistakeable terms of the preamble and resolutions annexed to it, coerce my mind to the unpleasant conviction, that he did understand the injunction to prohibit him from voting for the resolution creating the grant; and that the injunction was knowingly and designedly disobeyed. 770

Such an act is "wilful disobedience;"—is a criminal contempt, punishable as such, and indictable at common law and 771 by statute.

Such an act was calculated to defeat, impair, impede, and prejudice the remedies of the relators. It has actually prejudiced, if not impaired and defeated their rights.

If the facts stated in the complaint are true; if the grant was about to be made under circumstances manifesting a gross abuse of power, and which would make it a fraud upon the rights of every citizen; if the railway when built and used, would be a public nuisance, productive of special injury to the relators, it was their right that the grant should not be made.

If the injunction had not been violated, the whole question might have been determined in that action.

That cannot now be done. At least, it is not clear that it can be. The grantees have acquired rights, if the action of the Common Council has any legal validity; and they are not parties to this action. No judgment can be pronounced which can operate directly on them.

If the decisions of the Supreme Court of the United States are a correct exposition of existing law, and as such, controlling as authority, then I admit an inability to understand why the resolutions giving authority to Jacob Sharpe and others, to construct a railway, and their acceptance of it, are not as much a contract, as an act of a State Legislature, conferring precisely the same powers and rights.

I had supposed it to be well settled, that when the legislature of a State, whose powers are limited only by the prohibitions contained in the constitution of the State and that of the United States, passes an act, being in its nature a contract, and absolute rights have vested under it, that a repeal of the law cannot divest those rights, nor annihilate or impair the

title so acquired. That a legislative grant is a contract within the meaning of that provision of the United States' constitution, which prohibits a State legislature from passing any law impairing the obligation of contracts; and that the prohibition extends as well to executory as to executed contracts. (1 *Kent. Com.* 413, 422.)

If the making of this grant was a legislative act, within the 775 proper meaning of those terms; if the Common Council had full power to make it; if this power is beyond judicial control in every conceivable case, no matter how corruptly, fraudulently or ruinously to the rights of individuals and the public it may be about to be exercised; it will certainly be an anomaly, if, after the grant has been made and accepted, and the road built in every respect in conformity with the terms of such a grant as is contained in the resolution in question, the Common Council may rescind the grant, and divest the 776 rights acquired under it, precisely as they may order a street to be widened or extended, or may repeal any mere police ordinance or regulation.

If this be so, then it follows that, although a repealing act passed in such a case by the State legislature would be nugatory and of no effect, yet such a legislature has power to authorize another body to exercise legislative powers which it cannot exercise itself, and to give to the legislative action of the body it creates, the force and obligation of law; while the 777 same action, if performed by itself under the most solemn forms of legislation, would be utterly nugatory and void.

The form of the proceeding by which the Common Council  
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saw fit to confer full and absolute authority on Jacob Sharpe and others, to construct and operate by themselves and their successors, a railway in Broadway, determined nothing as to the nature of the transaction between that body and Sharpe and his associates. If they chose to grant the authority by a  
778 resolution resembling in form a legislative act, then the nature of the transaction is to be determined by the character of its provisions. If they confer power on certain persons to act under it, in such a manner that they may acquire rights and property solely by force of the resolution itself, and from having conformed to its requirements, the transaction is a contract. Such is the nature of the transaction in question, and the consideration to be paid for the grant is specified in the resolution.

779 Instead of being able to have it determined in this suit, whether it would not be a clear abuse of power on the part of the Common Council to make such a contract; and whether the execution of it would not produce a special injury to the plaintiffs beyond that to which every other citizen in common with them would be subjected, and to procure a judgment which would prevent the making of the grant, if the decision should be favorable to them; it now becomes necessary either to amend the proceedings and make the grantees parties in  
780 order to obtain a judgment that can operate directly upon them, or to institute a new action for that purpose.

There can be no doubt then, that the act of disobedience was calculated to defeat, impair, impede, and prejudice the remedies of the relators.

The court were reminded, on the argument, of the position taken on the hearing of the order to show cause, that the code requires a copy of the affidavit on which such an order is made, to be served with it, and were referred to a decision of this court—that to bring a party into contempt for disobe- 781 dience of an injunction order, it must have been served upon him by exhibiting the order itself, at the time the copy of it is delivered. (*Coddington vs. Webb*, 4 *Sand. S. C.* 639.)

The rule adopted in the case cited, if adhered to as a rule to be applied to all cases, would be productive of irreparable injuries to parties, as will be manifest from looking into the facts of some of the reported cases, which hold that a party may be punished as for a contempt, where he has knowingly and designedly done acts which he knew, at the time, the 782 court had, by an order, prohibited him from doing ; although at the time no order had been served, or in fact entered—but had only been directed to be entered.

(*Hull v. Thomas Head et al.* 3 *Edws. Ch. R.* 236.

*The People ex rel. Morrison v. Brower*, 4 *Paige*, 40.

*Stafford v. Brown and others*, *ib.* 360.

1 *Craig & Phillips*, 98 ; *McNeil v. Garratt*.

*Com. Digest, Chancery*, (D. 8;) *Injunction Notes*

a, b, c, d.

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*St. John's College, Oxford v. Carter and others*, 4

*Myl. & C.* 498.)

Where a party is directed by an order of court to do something, as to pay money, deposit papers, &c. his whole obligation to act at all, depends, not only on the existence of the

order, but also upon its being served in a particular manner ; it is a proper rule of practice not to hold him guilty of a dis-  
 784 obedience of the order for not having done the thing required, until he has been shown the order and furnished with a copy of it. There are reported decisions showing that in such cases the Court of Chancery has refused to punish as for a contempt, on the ground that the order itself was not shown to the party at the time of serving the copy.

If my brethren did not consider that the Aldermen and Assistant Aldermen were, *as such*, actual parties to the suit, and that there was a complete service on them by the service made on the chief officer of the corporation, and that such 785 service having been made, it is enough to render the defendants liable to be proceeded against as for a contempt, that they did what the injunction prohibited, with actual knowledge of its existence and contents, I cannot but think they would deem it important to allow the point decided in *Coddington v. Webb*, to be re-considered ; and so restrict its application as to prevent great and manifest injustice from being done under its operation.

If the defendants cannot be considered as being actually 786 parties to the suit in which the order was made, then the question would arise, whether it is operative against them as individuals ; and whether they can be proceeded against for having deliberately done, as the agents or officers by whom alone the party defendant could do the prohibited act, what they knew their principal had been forbidden to do, for the purpose of performing it in behalf of such a principal.

It is enough to say, that when an agent, officer or servant, claims no right to act or interfere at all, except in that capacity, and in that capacity he does acts which he knows it is 787 unlawful for his principal to do, and which it is impossible in the nature of things for the principal to do, except through his action, that he has no reason to complain of being subjected to the same consequences as would be visited on the principal himself for disobedience.

The cases cited in the Opinion given on the order to show cause—show that such a practice had been pursued.

The 2d sub. of § 1, of 2 R. S. 534, expressly provides not only "that parties to suits," but also, "attorneys, counsellors, solicitors, and *all other persons*," may be punished as for a contempt for the non-payment of money ordered by the court to be paid, in certain cases, but also "for any other disobedience to any lawful *order, decree* or process of such court."

There cannot well be a decree against a person not a party to a suit, which can operate upon him at all, except to prohibit him from doing, as the solicitor, attorney or agent of a *party*, some act which it enjoins the party from doing. 789

This section having authorized the punishment of persons other than parties to suits, for any and every disobedience to the lawful order or *decree* of the court, the language is broad enough to reach, and seems unmeaning, unless it is construed to reach the very case of disobedience of an order, by one person as *agent* of another, when he deliberately does what

he knows at the time, the court has forbidden his *principal and agents* to do.

790 In that way, he can disobey an *order* or *decree* made in a suit to which he is not a party. If he chooses to do that, knowing that every person is prohibited from doing it as the agent of the party, and in disobeying its acts as such agent, there is no reason why he should not be punished for such disobedience, and for such unlawful interference with the proceedings in the action." (*Ib. sub. 4.*)

It is unnecessary to examine further any of the objections taken to the regularity of the proceedings; the nature and 791 character of the disobedience are, at present, the matters of paramount importance.

A somewhat grave and delicate point is presented at the outset, to the consideration of the court. It arises out of the adoption of the preamble and resolutions annexed to it, which were adopted by the Board of Aldermen, immediately after the act violating the injunction.

They undoubtedly impute to the Judge who made the order, the high offence of having assumed, without color of law or 792 justification, to interfere with the legislative action of a body having legislative powers; that his order bore on its face an indirection not less unworthy of the judiciary than the alleged usurpation of authority; and seems to distinctly charge, that his acts were such an unwarrantable interference of a Judge, as should not be submitted to or tolerated, without a just rebuke.

The publication of such an attack upon the action of a judicial officer, pending a suit, and upon his conduct with reference to any order or decision made by him, in a suit pending and 793 undetermined at the time such publication is made, is a contempt at common law, and punishable as such. The cases cited below, would seem to leave the question free from doubt.

(J. B. Wallace's R. 77, Hollingsworth v. Duane.

Oswald's case, 1 Dall. 319.

Matthews v. Smith, 3 Hare, 331.

Littler v. Thomson, 2 Beavan, 129.

2 Atkyn's, 469; 13 Tes. 239; 1 Phillips, 454 and 605.

2 Mylne & Craig, 360.

Crawford's case, 13 Ad. & Ellis, (N. S.) 613.)

The inevitable effect of such a publication upon all who 794 may give the least credit to its statements, and to the imputations it contains, is to prejudice their minds against the justice of the plaintiffs' claims, and the truthfulness of the allegations of fact on which they based their right to relief, and to favor the idea that the law is not uprightly administered between the parties to the action; and thus to interrupt the free course of justice, and dishonor its administration. Such misconduct tends to prejudice both the rights and remedies of a party. The statute expressly provides that misconduct of 795 that tendency, in all cases where attachments and proceedings as for contempts, have been usually adopted and practised in courts of record, to enforce the civil remedies of any party to a suit in such court, or to protect the rights of any such party, may be punished in a proceeding like this. (2 R. S. 534, § 1, sub. 8.)

Besides, it is an "unlawful interference with the proceedings in an action;" and this, in this same section, is made a 796 distinct ground for punishing a party as for a contempt. (*Id.* § 1, *sub. 4.*)

It is not only an unlawful interference with the proceedings in the cause, but it is one whose consequences may be of the most grave and serious character.

In a country whose peace and quiet, and under a form of government whose very existence depends upon a cheerful obedience to law, and upon an absolute acquiescence in such protection to the rights of persons and property, and in such redress by way of the prevention and punishment of wrongs 797 as may result from such obedience, and from an impartial but firm administration of justice between man and man, it is of the highest importance to the public and to suitors, that those who administer the law, should not only be pure, but unsuspected.

It is not the personal injury that may possibly result to the members of a court, from falsely speaking and writing contemptuously of it, or of the judges, in their judicial capacity, who may compose it, of which the wrong done, wholly or in 798 any considerable degree, consists :

But the most grave and serious part of the wrong consists of the injury done to the community at large, by the tendency of such proceedings to dishonor the administration of justice ; and impair the confidence of the public in the integrity of those tribunals, to which they turn as a last resort, to obtain that

strict and impartial justice to which the laws of the country entitle them.

When our citizens feel that such a hope can be no longer confidently cherished ; that they cannot be certain of obtaining 799 just redress in the courts of justice ; that they must submit to such justice as may be awarded by a court whose official action in the case has been characterized by such an assumption and illegal exercise of power, that it ought not to pass unrebuked ; the courts will have become so contemptible, that nothing which might be published of them ought to be punished as a criminal contempt.

Yet no pretence has been made that the injunction was not granted from the purest convictions of duty, and on the honest 800 judgment that the case made by the complaint entitled the plaintiffs to it. The only apology, if it should be so called, that has been made, is—that those who disobeyed it, had a different opinion of the law from that entertained by the judge who granted it ; and that they chose to test the question of the jurisdiction of the court by disobedience, rather than have it determined by the tribunals created by the people, to settle such controversies in the mode prescribed by law.

No regret is expressed at having passed the preamble and 801 resolutions. On the contrary, the answers to the interrogatories conclude with challenging the authority of the judge to make the order that has been disobeyed ; and also the jurisdiction of the court, to entertain the proceedings in which it now becomes its duty to make a final decision.

These facts render the duty of the court in pronouncing final judgment still more delicate and embarrassing.

The duty which they are required to perform, is one which 802 they owe to the public, as well as to the parties to the proceeding. It is one in which no consideration personal to the members of the court exist or can arise, except such as are attendant upon the decision of every matter submitted to their judgment; and incident to the obligation and the wish to make a decision, which will render equal and exact justice to the defendant, the relators, and the public.

This duty, however unpleasant its performance, is not one from which they can escape, or which they can avoid. It is 803 one which they are coerced to discharge by the obligations springing from the office they hold; the duties of which they have sworn to faithfully and impartially discharge, according to the best of their judgment and ability.

In arriving at the conclusion what order should be made, the statute has, as to one part of it, left us no discretion: That is imperative, that a fine should be imposed, at all events sufficient to satisfy the costs and expenses of the proceedings.

The more serious question remains, whether any fine in 804 addition to this, should be imposed; and if so, to what amount? and whether any imprisonment should be ordered, except to coerce the payment of the fine.

In this case, the disobedience was deliberate and intentional; and was immediately followed by the introduction and passage

of the preamble and resolutions, to the character and tendency of which, sufficient reference has been made. If the defendant had contented himself with merely disobeying the injunction, and such disobedience had resulted from a belief that the judge granting it had no authority to make it, and that the 805 court had no jurisdiction, on any conceivable state of facts, of an action to restrain the doing of that which it prohibited—however pernicious the tendency of the example, the case would have been altogether different from that on which we are now obliged to decide.

The defendant, on his oath, states in answer to the interrogatories, that he not only then believed, but still believes, that the court has no jurisdiction of the action.

That belief may be ultimately held to be in accordance with 806 the law of the land; but the judgment of the court being to the contrary, it can find in it but very little mitigation of the offence, as that is not the mode in which a law-abiding citizen should test, in such a case, the accuracy of his opinion. I incline to the opinion, that the affidavits read on the part of the defendant on the order to show cause, should be taken into consideration. They contain, it is true, nothing in relation to the fact, whether he did or did not disobey the order; and therefore, having no bearing upon the question, whether he 807 disobeyed it, or whether the disobedience was wilful.

But they contain statements of facts, which, uncontroverted, might induce the defendants to believe that the offers, apparently so much more advantageous to the city, were not made in good faith, but were made by enemies of the measure;

and, under preconcerted arrangements with others, equally hostile to it, to take such legal proceedings as would inhibit them from constructing or attempting to construct the road, 808 even if their application had been preferred, and the authority had been given to them.

If such was the state of existing facts, or if he honestly believed such to be the facts, then a case was presented for the exercise of his discretion. And, with the mere exercise of his discretion, with reference to such a state of facts, no court, I presume, would interfere.

If such a state of facts shall be shown to have existed, the question of the authority of the Common Council to make 809 such a grant, would then be reduced to one of mere naked power to affect the rights of the public and of individuals; as it might be made to appear that such a road, and its use, would impair them.

That is a question on which this court has not, as yet, passed; and does not enter into the considerations upon which it concluded, that, on such a case as was made by the complaint, it had jurisdiction to make the order.

The facts stated in the opposing affidavits, do not touch the question of jurisdiction, but bear upon the merits of the controversy, and controvert the truth of some of the facts constituting the equity of the plaintiffs' case.

Neither do they tend to show, that the order was improvidently made, if the court is right in its views of its

jurisdictional powers ; for the judge who made the order was compelled, as he is in the case of every application, to determine upon the propriety of granting it, solely on the facts contained in the affidavits on which the application was based.

These affidavits were not before him ; nor would he have justified himself in refusing the order, by assuming, without 811 anything on which to base the assumption, that the facts stated in the complaint, and sworn to be true, were false in any material particular.

Still, the court should not overlook the consideration, that on these affidavits, third persons swear to facts, which, if uncontradicted, presented a case for the exercise by the defendant, of a discretion, if it should be ultimately determined that authority existed to make such a grant, in a case free from a fraudulent use or gross abuse of that authority ; and 812 provided also, that it shall appear that the road would not be a public nuisance.

The court, it is true, will not try the merits of the action in this proceeding, nor permit a party lawfully enjoined, to speculate upon what may be the decision of the court, upon the equity of the complaint upon which the injunction has been allowed ; nor to test the improvidence of granting it, by wilful disobedience.

But, I think it may properly look into opposing affidavits, 813 so far as to see if there is color for the position, that, if the facts existing had all been fully and fairly presented, in the affidavits on which the injunction was sought, the court might

have hesitated to grant it ; and if that is clearly apparent, to give some weight to it in determining what punishment should be awarded. But there is nothing in their affidavits which essentially mitigates the misconduct of the defendant.

814 The example set by him is not sought to be excused ; but, on the contrary, to be justified, on the ground of the utter want of jurisdiction of the court to entertain the action.

Such an example is exceedingly pernicious. So far as it produces any influence, it tends to predispose the community to array their own judgment against that of the tribunals constituted to declare and enforce the law ; and to wilfully disobey orders and judgments, whenever the parties against whom they are made, shall come to the conclusion that the court has mistaken the law.

815 It is obvious, that such a practice, if tolerated, would soon result in an open defiance of the administration of justice, through the constituted tribunals ; and the end would be inevitable and hopeless anarchy.

No human judgment is so perfect as to be exempt from a liability to err ; nor is the proper interpretation and appreciation of the law in all cases so easy, that different minds, aided by equal industry, experience, and integrity of purpose, will always come to the same conclusion.

816 State legislatures, sometimes, upon full consideration, enact laws, which the courts, in the honest and independent exercise

of their judgments, believe and adjudge to be repugnant to the constitution, and void. Such a law, any person, so far as strict legal right is concerned, may lawfully resist.

But any one who should attempt to question its validity, by forcible resistance, rather than by an appeal to the courts, whose province it is to determine that question, and whose powers are sufficient to insure him full indemnity and redress for any injury that may temporarily result from that obedience 817 which becomes the orderly citizen, would inflict a serious wound upon the institutions of the country; violate the principles on which they are founded; and furnish an example, which, if generally followed, would lamentably demonstrate, that, in the community of which he was a member, liberty, regulated by law, could not long continue.

Courts too, may err, as courts have erred, in relation to their jurisdiction. When such an error of judgment may unfortunately occur, however much it should be regretted, 818 the consequences are trivial in comparison with those which may result from a wilful disobedience to its orders, and an unexcused and inexcusable effort to dishonor the administration of justice, by a rude attempt to scandalize the courts of the country, or the judicial action of its members.

The example is still more pernicious in its tendency when set by a man invested with authority, who, by virtue of his office, is a conservator of the public peace, and a member of the courts constituted to try persons indicted for the commission of crimes. A wilful disobedience of any lawful order of 819 a court was a criminal offence, at common law, and is declared

to be such by the statutes of this State ; is punishable by imprisonment, in a county jail, not exceeding one year, or by fine not exceeding \$250, or by both such fine and imprisonment : (2 R. S. 697, § 40 ; *id.* 693, § 14 ; *id.* 278, § 10 ; *sub.* 3 *id.* 538, § 26.)

820 Giving the defendant the fullest benefit of every extenuating consideration that has been presented, the most favorable judgment that the court can render, consistent with a proper discharge of its duty to the public, is one which does not order imprisonment merely as a punishment, for the full term provided by the statute.

821 Every one must know that the members of the court, as a matter of necessity, cannot be ignorant of other and vague charges which are made against members of the Common Council. This fact is alluded to only for the purpose of saying that the judges of this court would be unworthy of the stations they occupy, if they allowed any such extraneous matters to exercise the slightest influence upon their deliberations, or in the formation of their judgment.

822 The only matter with which they have anything to do is, to determine whether the defendant has disobeyed an order lawfully made by a judge of this court ; what is the true nature and character of that disobedience ; what effect it has had, or is calculated to have upon the rights or remedies of the relators, and upon the interests of the community ; and to give such judgment as shall be just to them, to the defendant, and to the public.

That judgment should be formed and pronounced under the influence of precisely such considerations as would guide and control it, if the particular misconduct here complained of was the only misconduct ever imputed to the defendant for any act of his life, public or private. For this, and this alone, he is now on trial.

In the exercise of my best judgment, I think he should be 823 imprisoned in the county jail for the period of fifteen days; that he should also be fined to the amount of \$250, to be paid, when collected, to the Chamberlain of the City, for the benefit of its citizens; and in the further sum of one hundred and two dollars and twenty cents, to satisfy the costs and expenses of these proceedings, to be paid to the relators; and ordered to be committed to prison until such fine, and costs, and expenses are paid.

In giving judgment in such a matter, if there should chance 824 to be any error, the error should be one arising exclusively from the lenity of the sentence, and on no account from its severity.

I think a discrimination should be made between the case of this defendant and that of any other of the Aldermen, who merely voted for the preamble and resolutions; they might have so voted without that consideration and understanding of their import, and the manifest impropriety of passing them, which is naturally to be imputed to one who prepared and offered them for adoption.

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If the slightest regret for the passage of them had been  
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avowed in their answers to the interrogatories, on which the court could justify itself for overlooking that act, I should be disposed to go as far in that direction as would be consistent with a proper discharge of the duty which the court owes to the public.

But no regret is expressed for that act, or for having violated the injunction,—even the legality of the order is still questioned; and the jurisdiction of the court protested against: 826 all but two of them answer in the same form, and thus present themselves to the court as being alike insensible of the true character and tendency of the misconduct charged against them, and alike indifferent to the consequences to themselves or the public.

If the sober reflections, and more matured judgment resulting from a subsequent consideration of the matter, has induced either of them to regret the act, or to regard their 827 example as one dangerous in its tendency, he has not allowed the court to know it. However much the court may regret this result, it is one over which they have no control; they can look only to the case, as the defendants have preferred to make it; and must pass upon it, as it is submitted to them for final judgment.

In so deciding upon it, they are not at liberty to overlook the position which the defendants voluntarily chose to take up with reference to the act of disobedience, when presenting 828 their cases, as they desired it to be regarded by the court in forming its final sentence. *Palmer vs. Kelly, et al*, 4 Sand,

*Ch. R. 575. Mr. Lechmere Charlton case, 2 Myln & Cr. 359—360.*

It is my opinion, that a fine should be imposed on each of the other aldermen, except Ald. Smith and Doherty, of \$250, to be paid to the Chamberlain of the City; and the further sum of \$101 51, to satisfy the relators' costs and expenses of the proceeding.

Alderman Smith has made an apology which, while it does no discredit to him as a man or a public officer, furnishes grounds to the court for making a discrimination in his favor, which it would have been more agreeable to it to have been able to extend to all the defendants, if they had but thought proper to have made such answers to the interrogatories as would have rendered such action practicable.

Alderman Doherty voted against the preamble and resolutions. By this act, he repels the idea of intending by his disobedience any other contempt of the lawful authority of the court, than such as arises from a deliberate disregard of the order; induced, perhaps, by the conviction that he was the best judge of what the law was; and that he preferred disobedience, with its consequences to the public and himself, rather than submission to the order, and an application to the court to modify or vacate it.

Each of these defendants should be fined \$100, to be paid to the City Chamberlain; and the further sum of \$101.51, to be paid to the relators, to satisfy their costs and expenses of the proceedings against him.

831 The case of the Assistant Aldermen is somewhat different from that of the two Aldermen last named, or that of either of the others. They took no action upon the preamble and resolutions.

Before voting for the resolutions creating the grant, they obtained, as their answers state, the advice of counsel; and were advised, that "the injunction did not purport, and did not mean to restrain them from voting in favor of the said resolution."

832 This affidavit is not one which can justify the court in wholly omitting to impose a fine. It is not one which would prevent the taking of an inquest; or which would entitle a party to have a default opened, for the purpose of having a trial on the merits.

The name of the counsel is not stated; and the court is without any means of conjecturing whether his advice would be entitled to little or much consideration. On what statement of facts the advice was given, the answers do not disclose.

833 The answers do not state that counsel advised them that, voting for the resolutions containing the grant with the intent of enabling the grantees to accept it, and with the expectation that they would accept it, pending the injunction, would not be a palpable violation of it. We cannot imagine, that any respectable counsel would have given any such advice.

That it was not voted for with that intent and expectation,

is not denied. It is too clear in our judgment, to admit of a doubt, that they did vote for it, with that intent and expectation.

In that expectation, they were not disappointed. At some hour of the night on which the resolution was fully adopted 834 by their votes, and made absolute and effectual, so far as that result depended on the action of the Common Council, or the will of its members, it was accepted by the grantees in the manner prescribed ; and thus the grant became complete.

No regret is expressed for violating the injunction ; nor is the slightest intimation made that, under similar circumstances, their conduct would be different.

Their answers conclude with challenging the jurisdiction of the court to control or to call them to an account for their 835 vote.

The court has not attempted to coerce their vote against their convictions of duty ; nor made any order which would have prevented them from voting in favor of the resolution.

They were prohibited from granting to Sharpe and others, the privilege, or in any manner authorizing them to lay a track for a railway in Broadway.

They could have voted for the resolution, if they had added to it a provision that no acceptance of it should be made or filed ; or if made, that it should be void and of no effect, if 836

made before the injunction was vacated, or so modified as to allow of such acceptance. If the adopted resolution had been accompanied with such a provision, no court would have entertained a proceeding, to punish them on the ground that they had disobeyed the injunction.

If there had been a disposition to obey the order served upon them, it would seem that obedience might have been rendered, without jeopardizing any right or interest—public or private.

837 On and after the first of January, 1853, the Common Council would be as competent to pass the resolution against the veto of the new Mayor, as against that of his predecessor.

The same Aldermen continued in office through 1853; the changes made in the Board of Assistant Aldermen, by the previous November election, withdrew from it but four or five of its old members.

838 The adoption of a resolution, for which so many of each Board voted, against the objections of the Mayor, and, notwithstanding the injunction, would seem to be certain, if submitted anew to the Common Council of 1853, if the strong favor which it received resulted from a conviction of its paramount importance to the public interests.

There was no necessity, legal or moral, coercing any Alderman or Assistant to vote in favor of it, pending the injunction; the majority by whose votes it was adopted, had the

power to postpone the consideration to a future day, or to refuse to consider it then.

The objections and disapproval of the chief magistrate of 839 the city, admonished them that, in his judgment, it ought not to be passed. The order of a court, of competent authority, prohibited them, absolutely, from granting the privilege, or conferring the authority, which they did grant and confer, by the adoption of the resolution.

It was an order of the court, which had, on other occasions, prohibited them from doing acts, which, if performed at all, would be performed by their voting as Aldermen or Assistants, 840 in favor of pending resolutions. On other occasions, the order has been obeyed.

Under such circumstances, it is the duty of the court, after giving the greatest consideration to everything urged in extenuation, not to overlook the act, or encourage others to imitate the example; in consequence of granting to it entire impunity in a case so marked and prominent as this.

In my judgment, a fine of \$100 should be imposed on each of the Assistant Aldermen, to be paid to the City Chamberlain; and also of \$101.51, to be paid to the relators, to satisfy 841 their costs and expenses of the proceedings.

In the case of each of the Aldermen and Assistants, the order to be entered should direct that he be committed to prison until he pays the fine imposed upon him, and also the costs and expenses which he is ordered to pay.

## EMMET, J.—

Differed with the court, as to the amount of punishment, and said :

842 I regret to say, that while I concur fully with the general views of this case, as presented by the able opinion of Judge Duer, and agree to all the conclusions of law stated by him, I am not so fortunate as to assent entirely to the judgment which he has pronounced. I will endeavor, therefore, briefly to state in what respect I dissent from that judgment, and my reasons for so dissenting. In regard to the amount of fine imposed upon the delinquent parties respectively, both Aldermen and Assistant Aldermen, I have no objection to offer. Nor do I find fault with the judgment of the court as to the particular case of Alderman Sturtevant. But if it be right and proper—as I think it is—that Alderman Sturtevant should be punished by imprisonment, as the author and promoter of the resolutions and preamble which contemned the authority and impugned the motives of a Judge of this court, I am at a loss to perceive why the other members of the Board of Aldermen who approved of, adopted, and voted for those resolutions and preamble, should be wholly exempted from punishment of the same character.

843 It is true, that the case of Alderman Sturtevant is marked by more prominence than that of either of his associates. Those resolutions and preamble, were deliberately prepared by him; and in concocting them, he would seem to have taxed

the English language to obtain terms as offensive to the dignity and as defiant towards the authority of this court, as a gentleman could well use. He was, moreover, a member of the legal profession, and whatever his opinion may have been of the propriety or legal effect of the injunction, he was bound to know that his duty as a lawyer and a citizen forbade such an attack upon any branch of the judiciary; and it was his hand that, instead of aiming the blow, should have been raised to stay such an indignity, if offered to this court from any other quarter.

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I therefore, not only concur in the propriety of imprisoning him for fifteen days; but if the judgment of the court had been that such imprisonment should be for the full term of thirty days, it would have met with no objection from me. But while I grant the sufficiency of the reasons for punishing 846 Alderman Sturtevant with greater severity than his associates; I cannot admit that there is just ground for so great a disparity of punishment as the judgment of the court has made between them.

The other Aldermen who voted for those resolutions and preamble, heard them read, and deliberately adopted and passed them. It would be a bad compliment to the intelligence of these gentlemen to assume, that they did not understand what they were doing. Their official station forbids 847 any such supposition. If they were fit to be Aldermen of this city, they can claim no indulgence on the ground of ignorance of the true meaning and import of those resolutions and preamble; for they could not be misunderstood by any one of common capacity. In substance, they charge a Judge

848 of this court, not only with assuming prerogative and usurping authority and jurisdiction without color of law or justification; but that he did so with sinister, unjustifiable, unworthy and interested views—in other words, with dishonest and corrupt motives; and they deliberately avow the purpose not merely of utterly disregarding the order of that Judge, but of rebuking him for making it. Nor can I discover anything in the answer of these Aldermen, to the interrogatory on the subject of these resolutions and preamble, which offers any palliation of their offence; for, although they disclaim the intention to offer any contempt to the lawful authority of this court, they do not disavow the imputation of unworthy motives to the Judge; or that he had knowingly lent himself, as a minister of justice, to aid a device of the plaintiffs to defeat the grant by indirection, and virtually, to decide the case without a trial. With this view, therefore, of the position of the Aldermen, in regard to those resolutions and preamble, I repeat, that their offence merits punishment in my judgment, by imprisonment, on the same principle as that of Alderman Sturtevant, though in some less degree.

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850 It must not be supposed, that I regard the passage of those resolutions and preamble, as being capable (however designed) of impairing the standing, or even wounding the personal feelings of the individual judge, against whom they were directed. Certainly, no one of the judges of this court would feel affected by them, in either of those lights. I treat it as an assault upon judicial authority, and would punish it as such.

The judges, as ministers of the law, are but the servants of the public; but they are the depositaries of a trust, which it is

most important to the best interests of this community, to preserve in its integrity and plenitude. I mean the authority 851 of courts of justice—the respect of the people for the law, and those by whom it is administered; and, painful as it may be, and as it certainly is to myself on the present occasion, to vindicate that authority and preserve that public respect by severity of punishment, I regard it as a duty in the performance of which the judges of this court are bound not to falter.

I need hardly say, that no public rumors as to the official conduct of any members of the late Common Council could possibly influence my course in this matter; and I allude to 852 such rumors, merely for the purpose of declaring, as I now do, that were it not for their existence, and the apprehension of its being supposed that a willingness to gratify some public prejudice might have insensibly found its way into my judgment, I should feel much less reluctance than I do, under existing circumstances, in treating the conduct of the parties now before the Court with severity.

I have only to add, therefore, that if the punishment in this case had rested solely with me, I should have felt it my duty 853 to have imprisoned every other Alderman, besides Alderman Sturtevant, who voted for those resolutions and preamble, for ten days, except Alderman Wesley Smith, who alone has, in some degree, apologized for doing so. He has acknowledged the impropriety of the act; and, in a measure, excused himself, by stating, that he did so without due consideration at the time.

For this partial atonement, I should have mitigated his imprisonment to five days.

854 Alderman Doherty, although he violated the injunction by voting for the grant, had the decency or discretion to vote against the offensive resolutions and preamble ; and for taking that course, I agree in opinion with my brethren, that he should not be imprisoned ; and in all other respects, I concur with the judgment of the court.